TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted], 1910.

No. [redacted] 433

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

O. A. JOHNSON.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILED FEBRUARY 8, 1910.

(22012)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 786.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

O. A. JOHNSON.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

INDEX.

	Original.	Print
Caption	a	1
Writ of error	b	1
Return on writ of error	c	1
Citation	d	2
Proof of service of citation	e	2
Indictment	2	3
Order for capias	13	9
Capias	14	9
Return on capias	15	10
Entry of plea and recognizance	16	10
Entry of filing motion to quash indictment	17	10
Motion to quash indictment	18	11
Entry of argument of motion	19	11
Entry of order sustaining motion to quash indictment and dismissing case	20	11
Opinion by Philips, D. J.	21	12
Entry order sustaining writ of error, etc.	31	16
Petition for writ of error	32	16
Assignment of errors	34	17
Order allowing writ of error	36	18
Certificate of clerk	37	19

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a Pleas and proceedings before the District Court of the United States for the Western Division of the Western District of Missouri, In the matter of The United States vs. O. A. Johnson. No. 2795. Violation of the Pure Food and Drug Act, June 30th, 1906.

b UNITED STATES OF AMERICA, *set:*

The President of the United States to the judge of the District Court of the United States for the Western Division of the Western District of Missouri, greeting:

Because, in the records and proceedings and also in the rendition of the judgment of a plea which is in the said District Court, before you, between the United States of America and O. A. Johnson, a manifest error hath happened, to the great damage of the said the United States of America, as by its complaint appears.

We, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, D. C., on the 3rd day of March next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of the Circuit Court.

Issued at office in Kansas City, this 1st day of February, A. D. 1910.

[SEAL.] ADELAIDE UTTER,
Clerk of the U. S. Circuit Court, W. D. W. D. of Missouri.

Allowed by—

JNO. F. PHILIPS, *Judge.*

c WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI, *set:*

I do hereby return due and perfect obedience to the within writ, and do herewith, under the seal of said district court, distinctly and openly send the record and proceedings aforesaid with all things concerning the same.

Witness my hand as clerk and the seal of said court.

Issued at office in Kansas City this 2nd day of February, A. D. 1910.

[SEAL.] HOWARD N. McCREARY, *Clerk.*
By *Deputy Clerk.*

(Indorsed:) 2795. United States Circuit Court. Western District of Missouri. Western Division. The United States of America vs. O. A. Johnson. Writ of error. Filed February 1, 1910. Howard N. McCreary, District Clerk.

d UNITED STATES OF AMERICA, *ss:*

To O. A. JOHNSON, *Greeting:*

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington, D. C., on the 3rd day of March next, pursuant to a writ of error, filed in the clerk's office of the District Court of the United States for the Western Division of the Western District of Missouri, wherein the United States of America is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable John F. Philips, judge of the District Court of the United States for the Western Division of the Western District of Missouri, this 1st day of February, in the year of our Lord one thousand nine hundred and ten.

JNO. F. PHILIPS, *Judge.*

e UNITED STATES OF AMERICA,
Western District of Missouri, ss:

We hereby acknowledge due service of the within citation, this 1st day of February, A. D. 1910.

JAMES H. HARKLESS,
CLIFFORD HISTED,
Attorney for Defendant in Error.

(Indorsed:) 2795. United States District Court. Western District of Missouri. Western Division. The United States of America vs. O. A. Johnson. Citation. Filed Feb'y 1, 1910. Howard N. McCreary, district clerk.

1 In the District Court of the United States for the Western Division of the Western District of Missouri.

Be it remembered, That heretofore, to-wit, at the regular November term of the United States District Court for the Western Division of the Western District of Missouri, and on the 3rd day of November, A. D. 1909, the following entry appears of record to-wit:

United States vs. O. A. Johnson. No. 2795. Violation of the pure food & drug act. A true bill. H. B. Leavens, foreman.

2 Said indictment is in words and figures as follows, to-wit:

UNITED STATES OF AMERICA,
Western Division,
Western District of Missouri, ss:

In the District Court of the United States for the Western Division of the Western District of Missouri.

The grand jurors of the United States of America, duly chosen, selected, empaneled, sworn, and charged to inquire of and concerning crimes and offenses in the Western Division of the Western District of Missouri, upon their oaths present and charge: That on or about the 13th day of May, A. D. 1908, at Kansas City, Jackson County, Missouri, in said division and district, one, O. A. Johnson, whose Christian name is to the grand jurors not more fully known, doing business under the name of Doctor Johnson Remedy Company, did then and there unlawfully, wilfully and knowingly ship and deliver for shipment from one State of the United States, to-wit, the State of Missouri, to the city of Washington, in the District of Columbia, a certain box containing certain unbroken packages of drugs as follows, to-wit, one unbroken package called and denominated as to the contents thereof "Cancerine tablets;" two unbroken packages called and denominated as to the contents thereof "Antiseptic tablets;" two unbroken packages or bottles called and denominated as to the contents thereof "Blood purifier;" one unbroken package or bottle called and denominated as to the contents thereof "Special No. 4;" one unbroken package, box, or carton called and denominated as to the contents thereof "Cancerine No. 17;" one unbroken package, box, or carton called and denominated as to the contents thereof "Cancerine No. 1;" all of which said packages formed and constituted
3 what was termed in substance "Doctor Johnson's Mild Combination Treatment for Cancer," and all of which said packages, cartons, boxes, and bottles were then and there misbranded within the meaning of the law, to-wit, the act approved June 30, 1906, entitled "An act for preventing the manufacture, sale, and transportation of adulterated or misbranded or poisonous or deleterious foods and drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes;" that said unbroken package, box, or carton denominated as to the contents thereof "Cancerine tablets," was then and there labeled and branded as follows, to-wit: "Complies with the food and drug act, June 30th, 1906. Cancerine tablets. Take two tablets in water every three hours during the day. Do not take more than four doses in twenty-four hours. Prepared for and distributed by Dr. O. A. Johnson, 1233 Grand Ave., Kansas City, Mo.;" which said label and brand was then and there false and misleading in this, to-wit, that it bears thereon by the name, "Cancerine tablets," a statement

regarding such article and the substances contained therein, which is false and misleading in this particular; that it implies that said tablets labeled, "Cancerine tablets," as aforesaid, will cure and are effective in bringing about the cure of cancer, when in truth and in fact said article is wholly worthless and ineffective in bringing about the cure of cancer, as he, the said O. A. Johnson, then and there well knew, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States.

SECOND COUNT.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present and charge: That the said O. A. Johnson, whose Christian name is to the grand jurors not more fully known, on, to wit,
4 the 13th day of May, A. D. 1908, at Kansas City, Jackson County, Missouri, in said division and district, unlawfully, wilfully, and knowingly did ship and deliver for shipment from one State of the United States, to wit, the State of Missouri, to the city of Washington, in the District of Columbia, as aforesaid, a certain unbroken package or bottle called and denominated as to the contents thereof "Blood purifier," as aforesaid, which said package and bottle was then and there misbranded within the meaning of the law, to wit, the act approved June 30, 1906, entitled "An act for preventing the manufacture, sale, and transportation of adulterated or misbranded or poisonous or deleterious foods and drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes;" which said package and bottle was labeled as follows, to wit: "Guaranteed under the pure food and drugs act, June 30, 1906. Serial No. 18131. Contains not more than 20 per cent alcohol. Doctor Johnson's Mild Combination Treatment for Cancer. Blood Purifier. This is an effective tonic and alterative. It enters the circulation at once, utterly destroying and removing impurities from the blood and entire system. Acts on the bowels, kidneys, and skin, eliminating poisons from the system, and when taken in connection with the Mild Combination Treatment gives splendid results in the treatment of cancer and other malignant diseases. I always advise that the Blood Purifier be continued some little time after the cancer has been killed and removed and the sore healed. Recommended in all conditions associated with impure blood, poor digestion, and nonassimilation of food; also poor circulation, weak heart, etc. Directions—Shake well. Take one teaspoonful in a little cold water before each meal, three times a day. Do not take in too large doses. The best results can be obtained only where it is taken as directed. Forty-five drops usually make a teaspoonful. Please count and see that your teaspoon is not too large. Prepared for and distributed by
5 Doctor Johnson Remedy Company, 1233 Grand avenue, Kansas City, Mo.," which said label was then and there false and misleading in the following particulars, to wit: That it bears the false and misleading statement that said drug is a part of the

treatment for cancer; that it enters the circulation at once, utterly destroying and removing impurities from the blood and entire system; that when taken in connection with the mild combination treatment it gives splendid results in the treatment of cancer and other malignant diseases; that it is always advised that the blood purifier be continued some little time after the cancer has been killed and removed and the sore healed, whereby it is held out and falsely claimed that said drug is efficacious in the treatment of cancer and that the cancer thereby can be killed and removed and the sore healed, when in truth and in fact said drug contained in said packages so labeled is entirely worthless and without effect either in whole or in part as a cure for cancer and for killing and removing cancer and in healing the cancer sore, as he, the said O. A. Johnson, then and there well knew, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States.

THIRD COUNT.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present and charge: That the said O. A. Johnson, whose Christian name is to the grand jurors not more fully known, on, to wit, the 13th day of May, A. D. 1908, at Kansas City, Jackson County, Missouri, in said division and district, unlawfully, wilfully, and knowingly did ship and deliver for shipment from one State of the United States, to wit, the State of Missouri, to the city of Washington, in the District of Columbia, as aforesaid, a certain other unbroken package or bottle called and denominated as to the
6 contents thereof "Blood Purifier," as aforesaid, which said package and bottle was then and there misbranded within the meaning of the law, to wit, the act approved June 30, 1906, entitled "An act for preventing the manufacture, sale, and transportation of adulterated or misbranded or poisonous or deleterious foods and drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes;" which said package and bottle was labeled as follows, to wit, "Guaranteed under the pure food and drugs act, June 30, 1906. Serial No. 18131. Contains not more than 20 per cent alcohol. Doctor Johnson's mild combination treatment for cancer. Blood purifier. This is an effective tonic and alterative. It enters the circulation at once, utterly destroying and removing impurities from the blood and entire system. Acts on the bowels, kidneys, and skin, eliminating poisons from the system, and when taken in connection with the mild combination treatment gives splendid results in the treatment of cancer and other malignant diseases. I always advise that the blood purifier be continued some little time after the cancer has been killed and removed and the sore healed. Recommended in all conditions associated with impure blood, poor digestion, and nonassimilation of food; also poor circulation, weak heart, etc. Directions—Shake well. Take one teaspoonful in a little cold water before each meal, three times a day. Do not take in

too large doses. The best results can be obtained only where it is taken as directed. Forty-five drops usually make a teaspoonful. Please count and see that your teaspoon is not too large. Prepared for and distributed by Doctor Johnson Remedy Company, 1233 Grand avenue, Kansas City, Mo.," which said label was then and there false and misleading in the following particulars, to-wit, that it bears the false and misleading statement that said drug is a part of the treatment for cancer; that it enters the circulation at once, utterly
7 destroying and removing impurities from the blood and entire system; that when taken in connection with the mild combination treatment it gives splendid results in the treatment of cancer and other malignant diseases; that it is always advised that the blood purifier be continued some little time after the cancer has been killed and removed and the sore healed; whereby it is held out and falsely claimed that said drug is efficacious in the treatment of cancer and that the cancer thereby can be killed and removed and the sore healed; when in truth and in fact said drug contained in said packages so labeled is entirely worthless and without effect either in whole or in part as a cure for cancer and for killing and removing cancer and in healing the cancer sore, as he, the said O. A. Johnson, then and there well knew, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States.

FOURTH COUNT.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present and charge: That the said O. A. Johnson, whose Christian name is to the grand jurors not more fully known, on, to-wit, the 13th day of May, A. D. 1908, at Kansas City, Jackson County, Missouri, in said division and district, unlawfully, wilfully, and knowingly did ship and deliver for shipment from one State of the United States, to-wit, the State of Missouri, to the city of Washington, in the District of Columbia, as aforesaid, a certain unbroken package or bottle called and denominated as to the contents thereof "Special No. 4," as aforesaid, which said package and bottle was then and there misbranded within the meaning of the law, to-wit, the act approved June 30, 1906, entitled "An act for preventing the manufacture, sale, and transportation of adulterated or misbranded or poisonous or deleterious foods and drugs, medicines, and
8 liquors, and for regulating traffic therein, and for other purposes;" which said package and bottle was labeled as follows, to-wit, "Complies with the food and drug act, June 30th, 1906. Dr. Johnson's mild combination treatment for cancer. Special No. 4. Directions—This is to be used locally to all parts where the skin is not broken, but where there is swelling, soreness, and pain it is to be applied by rubbing in thoroughly with the fingers or hand once or twice daily, according to indications—taking about fifteen or twenty minutes in which to apply it, for the good coming from the use of this remedy depends fully as much upon the amount of rubbing done

as upon the quantity used. It has a strong stimulative and absorptive power; will remove swelling, arrest development, restore circulation, and remove pain. Is indicated in all cases of malignancy where there is a tendency of the disease to spread, and where there is considerable hardness surrounding the sore. Applied thoroughly to a lump or to an enlarged gland will cause it to soften, become smaller, and be absorbed. If this Special No. 4 should cause irritation of the skin, such as a blister or pimples to form, then discontinue its use at once, and apply the Cancerine No. 1 to the irritated parts night and morning until the irritation is relieved, then take up again the use of this Special No. 4. Prepared for and distributed by Dr. O. A. Johnson, 1233 Grand avenue, Kansas City, Mo.;" the statements borne by which said label were false and misleading in these particulars, to-wit, that said article will not in case of cancer remove swelling, arrest development, restore circulation, and remove pain; that it will not in case of cancer, when applied thoroughly to a lump or an enlarged gland, cause it to soften, become smaller, and be absorbed; that in case of cancer it is ineffiective and is not indicated in all cases of malignancy where there is a tendency of the disease to spread; that the tendency of said label and the statement borne thereon is to lead to the belief that said drug will cure and
9 tend to cure cancer in the manner indicated, when in truth and in fact it is entirely worthless and ineffective for the purposes stated in said label, as he, the said O. A. Johnson, then and there well knew, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States.

FIFTH COUNT.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present and charge: That the said O. A. Johnson, whose Christian name is to the grand jurors not more fully known, on, to wit, the 13th day of May, A. D. 1908, at Kansas City, Jackson County, Missouri, in said division and district, unlawfully, wilfully and knowingly did ship and deliver for shipment from one State of the United States, to wit, the State of Missouri, to the city of Washington, in the District of Columbia, as aforesaid, a certain package, box, or carton called and denominated as to the contents thereof "Cancerine No. 17," which said package, box, or carton was then and there misbranded within the meaning of the law, to wit, the act approved June 30, 1906, entitled "An act for preventing the manufacture, sale, and transportation of adulterated or misbranded or poisonous or deleterious foods and drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes;" which said package, box, or carton was labeled as follows, to wit, "Complies with the pure food and drug act, June 30th, 1906. Cancerine No. 17. Directions: Use during the night by spreading on the affected parts

and cover with cotton or soft white cloth. Dr. Johnson Remedy Co., 1233 Grand Avenue, Kansas City, Mo."; the statements borne by which said label were then and there false and misleading in the following particulars, to wit, that said drug is offered as a
10 part of the treatment for cancer, and that the use of the name "Cancerine No. 17" implies, holds out, and represents that said drug will cure and is effective in bringing about the cure of cancer, when in truth and in fact said article is wholly worthless and ineffective in bringing about the cure of cancer and in contributing to the cure of cancer, as he, the said O. A. Johnson then and there well knew, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States.

SIXTH COUNT.

And the grand jurors aforesaid, upon their oaths afore-said, do further present and charge: That the said O. A. Johnson, whose Christian name is to the grand jurors not more fully known, on, to wit, the 13th day of May, A. D. 1908, at Kansas City, Jackson County, Missouri, in said division and district, unlawfully, wilfully, and knowingly did ship and deliver for shipment from one State of the United States, to wit, the State of Missouri, to the city of Washington, in the District of Columbia, as aforesaid, a certain unbroken package, box, or carton called and denominated as to the contents thereof "Cancerine No. 1," which said package, box, or carton was then and there misbranded within the meaning of the law, to wit, the act approved June 30, 1906, entitled "An act for preventing the manufacture, sale, and transportation of adulterated or misbranded or poisonous or deleterious foods and drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes;" which said package, box, or carton was labeled as follows, to wit: "Complies with the food and drug act, June 30th, 1906. Dr. Johnson's mild combination treatment for cancer, tumor, and other chronic diseases. Cancerine No. 1. This is to be applied to the sore or cancer by spreading on a cloth cut the size of the sore after it has been thor-
oughly washed by the antiseptic. Tendency is to convert
11 the sore from an unhealthy to a healthy condition and promote healing. Also it destroys and removes dead and unhealthy tissue. Prepared for and distributed by Dr. O. A. Johnson, 1233 Grand ave., Kansas City, Mo.;" which said label and brand was then and there false and misleading in this, to wit, that it bears thereon, by the name "Cancerine No. 1" and otherwise, statements regarding such articles and the substances contained therein, which are false and misleading in these particulars; that said drug is a part of the treatment for cancer; that said drug labeled "Cancerine No. 1," as aforesaid, will cure and is effective in bringing about the cure of cancer; that the tendency of said drug is to convert the sore from an

unhealthy to a healthy condition and to promote healing; also that it destroys and removes dead and unhealthy tissue; when in truth and in fact said article and drug is wholly worthless and ineffective in bringing about the cure of cancer or contributing thereto; that it has no tendency in the case of cancer to convert the sore from an unhealthy to a healthy condition and to promote healing, and, in case of cancer, does not destroy and does not remove the unhealthy cancerous tissue, as he, the said O. A. Johnson, then and there well knew, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States.

A. S. VAN VALKENBURGH,
United States Attorney.

12 Said indictment is indorsed on the back as follows, to wit: No. 2795. United States District Court, Western Division Western District of Missouri. The United States vs. O. A. Johnson. Indictment for act June 30, 1906, food and drug act. A true bill. H. B. Leavens, foreman grand jury. Filed Nov. 3, 1909. Howard N. McCreary, clerk. A. A. Van Valkenburgh, U. S. attorney. Witnesses: C. H. Kimberly, Hermann E. Pearce, F. P. Morgan.

13 On the said 3rd day of November, A. D. 1909, the following further entry appears of record, to wit:

United States vs. O. A. Johnson. No. 2795.

On motion of the district attorney who prosecutes on behalf of the United States, it is ordered that a capias issue for the said defendant, O. A. Johnson, returnable forthwith.

14 Said capias, which was returned and filed on the 4th day of November, 1909, is in words and figures as follows, to wit:

UNITED STATES OF AMERICA.
Western Division of the Western District of Missouri, ss:

The President of the United States of America to the marshal of the United States for the Western District of Missouri, greeting:

You are hereby commanded to take O. A. Johnson, if he be found in your district, and him safely keep so that you have him before the District Court of the United States for the Western Division of said District, forthwith, to answer an indictment preferred against him by the grand jury of the United States for violation of the pure food and drug act, and do you certify to said court how you executed this writ, and have you then there this writ.

Witness the Honorable Jno. F. Philips, judge of the United States for the Western District of Missouri, this 3rd day of November, A. D. 1909. Issued at Kansas City, in said district, under seal of said court, the day and year last above written.

[SEAL.] HOWARD N. MCCREARY, *Clerk.*

15 The marshal's return on said capias is in words and figures as follows, to wit:

I hereby certify I executed this writ by taking into my custody the within named O. A. Johnson, at Kansas City, Jackson County, Missouri, and have his body now in court as commanded to do.

All done on Nov. 4, 1909.

E. R. DURHAM,
United States Marshal.
By J. E. MORRISON, *Deputy.*

Marshal's fees	2.00
Expenses	.15
	2.15

16 On the 5th day of November, A. D. 1909, the following entry appears of record, to wit:

United States vs. O. A. Johnson. No. 2795.

This day comes A. S. Van Valkenburgh, United States district attorney, who prosecutes on behalf of the United States; also comes the defendant, O. A. Johnson, in his own proper person, who, being duly arraigned for plea, says he is not guilty as charged in the indictment. Thereupon it is ordered that the defendant, O. A. Johnson, be recognized in the sum of five hundred ($500) dollars, with C. W. Pyle as surety.

Now comes O. A. Johnson and C. W. Pyle and, in open court, acknowledge themselves to be indebted to the United States of America in the sum of five hundred dollars ($500), to be levied of their goods and chattels, lands and tenements, and to the use of the United States rendered, to be void on condition that the said O. A. Johnson shall personally appear before this court on the first day of the next term thereof, and from day to day and term to term as ordered by the court, during the pendency of this case, and shall not depart without leave of said court, otherwise to remain in full force and effect.

17 Afterwards, on the 30th day of November, 1909, the following entry appears of record, to wit:

United States vs. O. A. Johnson. No. 2795.

This day comes the defendant, O. A. Johnson, by his counsel, Harkless & Histed, and files a motion to quash the indictment herein. December 10th, 1909, is set for the hearing of said motion, upon agreement of parties.

18 Said motion to quash the indictment, filed November 30th, 1909, is in words and figures as follows, to wit:

In the District Court of the United States of America, Western Division of the Western District of the State of Missouri.

UNITED STATES OF AMERICA,
vs.
O. A. JOHNSON. } No. .

Motion to quash indictment.

Comes now the defendant, O. A. Johnson, and wa'ves the court to quash each and every count of the indictment in the above entitled cause, for the reason and because:

1st. Each and all of the six counts of the indictment fail to state facts sufficient to constitute any crime or offense under the act of Congress approved June 30th, 1906, as in each of said counts claimed and charged.

2nd. No facts are alleged or stated in any of counts, that come within or covered by the provisions of said act of June 30th, 1906, set up and relied upon in said indictment.

HARKLESS & HISTED,
Attorneys for Defendant.

19 On the 4th day of January, 1910, the following entry appears of record, to wit:

United States vs. O. A. Johnson. No. 2795.

This day comes A. S. Van Valkenburgh, United States District Attorney, who prosecutes on behalf of the United States, also comes the defendant O. A. Johnson by his counsel, Harkless & Histed, and the motion to quash the indictment heretofore filed, is argued by counsel, submitted to the court, and by the court taken under advisement.

20 On the 8th day of January, 1910, the following entry appears of record, to wit:

United States vs. O. A. Johnson. No. 2795.

The motion heretofore filed herein by the defendant to quash the indictment coming on for hearing, and A. S. Van Valkenburgh, United States district attorney, who prosecutes on behalf of the United States, appearing and the defendant appearing by his counsel, Harkless, Crysler & Histed, the motion was taken up, argued and submitted to the court, and the court being fully advised in the premises:

It is ordered that the said motion be and the same is hereby sustained and the defendant is discharged herefrom, and the sureties on his appearance bond are discharged therefrom.

21 On the 8th day of January, 1910, an opinion was filed in words and figures as follows, to wit:

In the District Court of the United States for the Western Division of the Western District of Missouri.

UNITED STATES, PLAINANT,
vs.
O. A. JOHNSON, DEFENDANT.

Opinion by Phillips, District Judge.

The defendant has filed motion to quash the indictment, for the principal reason that it does not disclose an indictable offense. It is predicated of what is known as the "Pure Food and Drug Act," entitled "An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes," approved, June 30, 1906. It contains six counts. The first count, in substance, charges that the defendant shipped from one State to another certain articles designated as "Cancerine tablets," "Antiseptic tablets," "Blood purifier,"
22 "Special No. 4," "Cancerine No. 17," "Cancerine No. 1," which constituted "Dr. Johnson's mild combination treatment for cancer." It charges that they were misbranded within the meaning of the act aforesaid, in that the broken packages, etc., of "Cancerine tablets" were labeled and branded as follows, to wit: "Complies with the food and drug act, June 30, 1906. Cancerine tablets. Take two tablets in water every three hours during the day. Do not take more than four doses in twenty-four hours. Prepared for and distributed by Dr. O. A. Johnson, 1233 Grand Ave., Kansas City, Mo."; which said label or brand is alleged to be false and misleading in that it bears the name "Cancerine tablets," which statement, regarding such articles and substances contained therein, is false and misleading in that it implies that said tablets will cure, and are effective in bringing about the cure of cancer, which was untrue, and that they were worthless and ineffective for such purpose.

The second count is predicated of packages containing "Blood purifier," which were misbranded within the meaning of said act, in that they were labeled, "Guaranteed under the pure food and drug act, June 30, 1906, serial No. 18132. Contains not more than
20 per cent alcohol. Dr. Johnson's mild combination treat-
23 ment for cancer. Blood purifier. This is an effective tonic and alterative. It enters the circulation at once, utterly destroying and removing impurities from the blood and entire system. Acts on the bowels, kidneys, and skin, eliminating poisons from the system, and when taken in connection with the mild combination treatment gives splendid results in the treatment of cancer and other malignant diseases." This was followed with directions how to take

the remedy. The charge is then made that said label was false and misleading in that it bears false statement that said drug is a part of the treatment for cancer, etc., whereby it held out and falsely claimed that said drug is efficacious in the treatment of cancer, etc., when in truth and fact the drug contained in said packages is worthless and ineffective for such purpose.

The third count is predicated of packages under the name of "blood purifier," and is in effect the same as the preceding shipment, only to a different party.

The fourth count is predicated of packages and bottles under the name of "Special No. 4" with the label "Dr. Johnson's mild combination treatment for cancer. Special No. 4," with directions as to how it was to be applied and used and its effect. This
24 label is charged to be false and misleading in that it would not accomplish the results stated.

The fifth count is predicated of shipments of boxes, etc., containing "Cancerine No. 17," with directions as to how the same should be applied and used. The indictment charges that these were false and misleading in that said drug was offered as part of the treatment for cancer, holding out and representing that said drug will cure, and is effective in bringing about the cure of cancer, when in fact and in truth it was not effective for such purpose.

The sixth count is predicated of a shipment of box or carton called "Cancerine No. 1," which is alleged to be misbranded within the meaning of the act, in that the label contained the following: "Dr. Johnson's mild combination treatment for cancer, tumor, and other chronic diseases. Cancerine No. 1," with directions as to how the same should be applied and used. Said label or brand is alleged to be false and misleading in that it bears thereon the name "Cancerine No. 1," statements regarding such articles and substances contained therein which are false and misleading, in that said drug was represented as part of the treatment for cancer, and that it would cure, and is effective in bringing about the cure of cancer, etc., when
25 in truth and fact it is wholly worthless and ineffective for the purposes recommended.

From which it is apparent that no charge is preferred by the indictment that the drug or medicine was adulterated, or that it contained anything that was poisonous or deleterious, or that it contained less than what was represented, or that in any respect there was any misbranding as to the contents and composition thereof. The substantive charge is that the articles manufactured and shipped by the defendant are and were inefficacious in producing the cures and remedies indicated by the label. The question, therefore, to be decided is whether this presents an indictable offense within the provisions of the pure food and drug act. The very title of the act indicates its scope and purport. Its underlying purpose was to protect the public health against the imposition upon the users of foods, drugs, and medicines which were adulterated, misbranded, poisonous, or deleterious. To this end, the first section of the act makes it unlawful and

an indictable offense for any person to manufacture . . . . any article of food or drug which is adulterated or misbranded within the meaning of the act.

The second section forbids the introduction into any State,
26 etc., or from any foreign country, or shipment to any foreign country, of any article of food or drug which is adulterated or misbranded within the meaning of the act, etc.

The third section directs that the Secretary of the Treasury, of Agriculture, and of Commerce and Labor shall make uniform rules and regulations for carrying out the provisions of the act.

The fourth section declares that the examinations of specimens of foods and drugs shall be made in the Bureau of Chemistry of the Department of Agriculture, or under the direction and supervision of such bureau, "for the purpose of determining from such examinations whether such articles are adulterated or misbranded within the meaning of this act."

Section 5 declares the duty of district attorneys, to whom the Secretary of Agriculture shall report any violation of this act.

Section 6 declares that the term "drug," as used in the act, shall include all medicines and preparations recognized in the United States Pharmacopoeia or National Formulary for internal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of diseases of either man or animal.

Section 7 then specifies when an article shall be deemed to
27 be adulterated: In case of drugs, if it differs from the standard of strength, quality, or purity, as determined by the test laid down in the United States Pharmacopoeia or National Formulary; "Provided, that no drug defined in the United States Pharmacopoeia or National Formulary shall be deemed to be adulterated under this provision if the standard of strength, quality, or purity be plainly stated upon the bottle, box, or other container thereof, although the standard may differ from that determined by the test laid down in the United States Pharmacopoeia or National Formulary;" or if its strength or purity fall below the standard under which it is sold; or any substance has been substituted wholly or in part for the article; or any valuable constituent of the article has been wholly or in part abstracted; or if it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed; or if it contain any added poisonous or other added deleterious ingredient which may render such articles injurious to health (with a certain provision); or if it consist in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, etc.

Section 8 is as follows:

"That the term 'misbranded,' as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition
of food, the package or label of which shall bear any statement,
28 design, or device regarding such article, or the ingredients or substances contained therein which shall be false or mislead-

ing in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced."

It is conceded that the indictment is predicated of the words contained in the foregoing section 8, "the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular." In other words, the contention is that the label on the bottle or container, as to the curative or remedial effect of the contents, is a misbranding within the meaning of the statute, if in fact the prescription be ineffectual for the purpose indicated. This, it seems to me, is an entire misconception of the term "misbranding" as used in the act. The language: "the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular," must be read and interpreted, so as to have regard to its context, and is to be restrained by the subject-matter of the act.

Having regard to the intendment of the whole act, which is to protect the public health against adulterated, poisonous, and
29 deleterious food, drugs, etc., the labeling or branding of the bottle or container, as to the quantity or composition of "the ingredients or substances contained therein which shall be false or misleading," by no possible construction can be extended to an inquiry as to whether or not the prescription be efficacious or worthless to effect the remedy claimed for it. Pretermitting any expression of opinion as to how far Congress may go in the direction claimed under this indictment, it is sufficient to say that this legislation, predicated of the commerce clause of the Federal Constitution, it must be conceded, presses the power of the General Government close to the confines of limitation.

In the debates in Congress, when this measure was under consideration, it was never sought to be justified except on the ground of protecting the public health, as it might be affected by interstate shipments of food, drugs, etc. At no time was it asserted, or pretended, that it was proposed to reach the matter of holding the manufacturers and vendors of prescriptive or patented medicines, multitudinous and multiform as they are, to criminal liability for misstatements as to the curative or remedial effects of the prescription, which would necessarily depend upon the opinions of contending experts and the users of the nostrums.

30 As this is a criminal statute, creating a new offense, it must be restrained to its expressed, reasonable intendment; otherwise the courts, by mere construction, may extend its operation far beyond the legislative intent. If it had been the mind of Congress to make it an indictable offense for such manufacturers and vendors by their labels or brandings on bottles and packages to mislead the

buyers as to the curative or healing properties of the drugs, as to the mere matter of commendation, apt words, both in the title and body of the act, could and should have been easily employed to indicate such purpose, and not leave it to the courts by strained construction to read it into the statute.

The motion to quash is sustained.

31 At the said November term, 1909, and on the 1st day of February, 1910, the following entry appears of record, to wit:

United States vs. O. A. Johnson. No. 2795.

This day comes A. S. Van Valkenburgh, United States district attorney, who prosecutes on behalf of the United States, and files a petition for writ of error, together with his assignments of error, which petition is duly sustained, and a writ of error in open court is allowed by the court, to the Supreme Court of the United States from the decision and judgment entered January 8th, 1910, quashing the indictment, and each and every count thereof, in the above-entitled cause.

Thereupon citation is duly issued and signed by the court admonishing O. A. Johnson to be and appear at the Supreme Court of the United States in the city of Washington, D. C., on the 3rd day of March, 1910, the day this citation is returnable, service of which said citation is by James H. Harkless and Clifford Histed, counsel for defendant, O. A. Johnson, duly accepted in open court, and the same is duly filed herein.

32 Said petition for writ of error, filed February 1st, 1910, is in words and figures as follows, to-wit:—

In the District Court of the United States of America for the Western Division of the Western District of Missouri.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
O. A. JOHNSON. } No. 2795.

Petition for writ of error.

To the honorable judges of the Supreme Court of the United States:

Comes now the above-named plaintiff, the United States of America, by A. S. Van Valkenburgh, esquire, its attorney for the Western District of Missouri, and complains that in the record and proceedings had in said cause, and also in the rendition of the decision and judgment in the above-entitled cause, in said United States District Court for the Western Division of the Western District of Missouri, at the November term, 1909, thereof, against said plaintiff, on the 8th day of January, 1910, manifest error hath happened to the great damage of said plaintiff in the decision and judgment of said District Court in quashing the indictment therein, and all the counts thereof, which said decision and judgment is based upon the construction of the statute upon which said indictment is

founded, to wit, the act of Congress approved June 30, 1906, entitled, "An act for preventing the manufacture, sale, or trans-
33 portation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines and liquors, and for regulating traffic therein, and for other purposes."

Wherefore this plaintiff prays for the allowance of a writ of error in said cause, and for such other orders and process as may cause the errors so complained of to be corrected, and the judgment and decision in said cause to be reversed by the Supreme Court of the United States of America.

Dated this first day of February, A. D. 1910.

A. S. VAN VALKENBURGH,
United States Attorney for the Western District of Missouri,
Attorney for Plaintiff.

34 Said assignment of errors, filed February 1st, 1910, is in words and figures as follows, to-wit:

In the District Court of the United States of America for the Western Division of the Western District of Missouri.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
O. A. JOHNSON, DEFENDANT. } No. 2795.

Assignment of errors.

Comes now the United States of America, plaintiff herein, by A. S. Van Valkenburgh, esquire, its attorney for the Western District of Missouri, and says that in the record and proceedings in the above entitled matter, there is manifest error in this, to-wit:

1. That the court erred in sustaining the motion to quash the indictment in said cause, and each and every count thereof, and by holding and deciding that said indictment, and each of the counts thereof, failed to state facts sufficient to constitute any crime or offense under the act of Congress approved June 30, 1906, as in each of said counts claimed and charged.

2. The court erred in sustaining the motion to quash the indictment in said cause, and each and every count thereof, and by holding and deciding that no facts are alleged or stated in any of said counts that come within or are covered by the provisions of said act of June 30, 1906, upon which said indictment is founded.

3. The court by its decision and judgment quashing said in-
35 dictment, and each and every count thereof, erred in its construction of the statute upon which said indictment is founded.

4. The court erred in sustaining said motion to quash and in not overruling the same.

5. The decision of the court upon said motion to quash should have been in favor of the plaintiff.

6. The court erred in holding that the intendment of the statute upon which said indictment is founded is restricted to protecting the public health against adulterated, poisonous, and deleterious foods and drugs.

7. The court in its decision and judgment quashing said indictment erred in its construction of the term "misbranding" as used in said act.

8. The court in its decision and judgment quashing said indictment, and each and every count thereof, erred in its construction of the language "the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein, which shall be false or misleading in any particular," as used in said act.

Wherefore, the said United States of America prays that the decision and judgment of the said District Court of the United States for the Western Division of the Western District of Missouri may be reversed, annulled, and held for nothing, and that the said United States of America may be restored to all things which it has lost by occasion of the said judgment.

A. S. VAN VALKENBURGH,
United States Attorney for the Western District of Missouri. Counsel for Plaintiff.

KANSAS CITY, MISSOURI, *February 1st, 1910.*

36 Said order allowing writ of error, filed February 1st, 1910, is in words and figures as follows, to wit:

In the District Court of the United States of America for the Western Division of the Western District of Missouri.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
O. A. JOHNSON, DEFENDANT. } No. 2795.

Order allowing writ of error.

Upon motion of A. S. Van Valkenburgh, esquire, attorney for the United States of America, plaintiff in error, and on filing petition for an order allowing writ of error, together with an assignment of errors,

It is ordered that a writ of error be and is hereby allowed to the Supreme Court of the United States from the decision and judgment entered January 8, 1910, quashing the indictment and each and every count thereof, in the above entitled cause, and that a certified transcript of the record and proceedings herein be forthwith transmitted to the said Supreme Court of the United States.

JNO. F. PHILIPS,
Judge United States District Court, Western Division Western District of Missouri.

Dated at Kansas City, Missouri, February first, A. D. 1910.

37 UNITED STATES OF AMERICA, *set:*

I, Howard N. McCreary, Clerk of the District Court of the United States for the Western Division of the Western District of Missouri, do hereby certify the foregoing to be a full copy of the records and proceedings in the said court in case No. 2795, The United States vs. O. A. Johnson, and I further certify that the original citation and writ of error are prefixed hereto and returned herewith.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Kansas City, in said District, this 2nd day of February, A. D. 1910.

[SEAL.]

HOWARD N. MCCREARY,
Clerk U. S. District Court.

(Indorsed:) File No. 22012. W. Missouri D. C. U. S. Term No. 786. The United States, Plaintiff in error, vs. O. A. Johnson. Filed February 8th, 1910. File No. 22012.

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

THE UNITED STATES, PLAINTIFF IN error,
v.
O. A. JOHNSON.
No. 786.

MOTION TO ADVANCE.

The defendant in error, O. A. Johnson, was indicted in the District Court of the United States for the Western District of Missouri on November 3, 1909, charged with violating the pure food and drug act of June 30, 1906. It was alleged that Johnson, doing business under the name of Dr. Johnson Remedy Company, shipped from one State to another certain articles designated as "Cancerine tablets," "Antiseptic tablets," "Blood purifier," etc., the labels upon which were false and misleading in that they implied that the articles would cure and were effective in bringing about the cure of cancer, which was untrue, and that they were worthless and ineffective for such purpose.

A motion to quash was filed and sustained by the court on the ground that the pure food and drug act is restricted to protect the public health against adulterated, poisonous, and deleterious foods and drugs, and the inquiry whether a label on such a package is false or misleading can not be extended to ascertaining whether or not the prescription is "efficacious or worthless to effect the remedy claimed for it."

The case is here under the criminal appeals act, and the Solicitor-General, in accordance with the provision of that act giving precedence, moves the court to advance the case on the docket for hearing on a day convenient to the court during the next term.

Notice of this motion has been served upon opposing counsel.

LLOYD W. BOWERS,
Solicitor-General.

APRIL, 1910.

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INDEX.

	Page.
Statement	1
Text of food and drugs act	5
Specification of errors	17
First. Acts charged fall within letter of the statute	17
Second. Acts charged fall within purposes of the statute	19
A. Injuries to health	19
B. Cheats and frauds	20
Third. Legislative history affirmatively shows that such acts were intended to be covered	29
A. The controversy over extension of the definition of the word "drug" to include patent medicines turned on this very point	30
B. The amendment to the bill changing the definition of misbranding so as to cover not merely "any statement regarding the ingredients or substances contained in the article," but also any statement regarding the article itself, was made as a result of doubt whether this sort of thing would otherwise be covered	42
C. A substitute bill, which was urged as preferable because it expressly excluded misstatements of curative properties, was rejected	48
Fourth. The evil of the cure-all claims was one of the principal evils denounced in the public agitation coincident with the progress of the bill	50
Fifth. From the first enforcement of the act the administrative officers have uniformly applied it to such cases as this	52
Sixth. The similar provisions of various State statutes have likewise been construed by the administrative officers as covering such cases	60
Seventh. The general definition of misbranding would have no application to patent medicines unless it applies to this sort of thing	61
Eighth. Nor is this class of misrepresentation to be excluded from the statute as involving matters of scientific opinion	63
A. Our jurisprudence does not place matters beyond legal control merely because their correct solution may depend upon opinion	64
B. The cure-all misrepresentations do not practically present any real scientific questions of opinion	73
Ninth. The constitutional power of Congress to prohibit the use of the instruments of interstate commerce to the injury of the public is no longer open to question	79
Tenth. The statute is remedial and should not be narrowly construed	79
Conclusion	79

APPENDIX.—*Illustrations of public agitation against the "cure-all" evil contemporary with the progress of bill.*

Collier's Weekly:
"The Great American Fraud," by Samuel Hopkins Adams. I
October 7, 1905. "The Nostrum Evil" I
November 18, 1905. "Liquozone" VIII
January 13, 1906. "Preying on the Incurables" XXIII
February 17, 1906. "The Fundamental Fakes" XXXIV
Ladies' Home Journal:
April, 1905. Editorial XXXIX
January, 1906. Article by Mark Sullivan XLIV
February, 1906. Article by Mark Sullivan XLV
Popular Science Monthly:
September, 1905. "Quackery," by Prof. Dudley F. Sicher. XLVII
June, 1906. "Facts about Nostrums," by Dr. Horatio C. Wood LIII
W. C. T. U.:
Patent Medicine Leaflet No. 2 LIX
June, 1904. "A Study of Patent Medicines," by Mrs. Martha M. Allen LIX

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

UNITED STATES, PLAINTIFF IN ERROR,
v.
O. A. JOHNSON.
No. 433.

IN ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI.

BRIEF FOR THE UNITED STATES.

This is writ of error under the criminal appeals act of March 2, 1907, chapter 2564, to review a decision and judgment quashing an indictment and all the counts thereof, which decision and judgment were based upon the construction of the statute upon which the indictment was founded, namely, the food and drugs act of June 30, 1906, chapter 3915 (34 Stat. L., 768).

The question in brief is whether false and misleading statements on the label of a patent medicine as to alleged curative properties thereof (the "cure-all" type of statements) constitute "misbranding" under the food and drugs act.

The court below (Phillips, D. J.) held that they did not (fols. 21–31). 177 F. R., 313.

The indictment (fols. 2–12) charged in substance that the defendant, one O. A. Johnson, doing business in the name of Dr. Johnson Remedy Company, unlawfully, willfully, and knowingly shipped from the State of Missouri to the city of Washington, D. C., certain unbroken packages of drugs, all of which were misbranded within the meaning of the said act, because their labels were false and misleading in stating that the articles would cure and tend to cure cancer, whereas in truth and in fact the articles were entirely ineffective and worthless for that purpose, as said Johnson well knew.

The six counts of the indictment all raise the question in substantially the same way, each count dealing with a separate package, and all the packages forming together what was termed "Dr. Johnson's Mild Combination Treatment of Cancer." The labels involved under the second, third, fourth, and sixth counts make the representations of curative properties directly and explicitly, whereas the labels involved in the first and fifth counts make the representations not explicitly but by necessary implication. It is considered that no difference arises in the construction of the statute on this distinction.

The second count is sufficient to illustrate the principle. This count relates to a package labeled as follows:

> Guaranteed under the pure food and drugs act, June 30, 1906. Serial No. 18131. Contains not more than 20 per cent alcohol.

Doctor Johnson's Mild Combination Treatment for Cancer. Blood Purifier. This is an effective tonic and alterative. It enters the circulation at once, utterly destroying and removing impurities from the blood and entire system. Acts on the bowels, kidneys, and skin, eliminating poisons from the system, and when taken in connection with the Mild Combination Treatment gives splendid results in the treatment of cancer and other malignant diseases. I always advise that the Blood Purifier be continued some little time after the cancer has been killed and removed and the sore healed. Recommended in all conditions associated with impure blood, poor digestion, and nonassimilation of food; also poor circulation, weak heart, etc. Directions.—Shake well. Take one teaspoonful in a little cold water before each meal, three times a day. Do not take in too large doses. The best results can be obtained only where it is taken as directed. Forty-five drops usually make a teaspoonful. Please count and see that your teaspoon is not too large. Prepared for and distributed by Doctor Johnson Remedy Company, 1233 Grand Avenue, Kansas City, Mo.

As to this label the indictment then proceeds as follows:

* * * which said label was then and there false and misleading in the following particulars, to wit: That it bears the false and misleading statement that said drug is a part of

the treatment for cancer; that it enters the circulation at once, utterly destroying and removing impurities from the blood and entire system; that when taken in connection with the mild combination treatment it gives splendid results in the treatment of cancer and other malignant diseases; that it is always advised that the blood purifier be continued some little time after the cancer had been killed and removed and the sore healed, whereby it is held out and falsely claimed that said drug is efficacious in the treatment of cancer and that the cancer thereby can be killed and removed and the sore healed, when in truth and in fact said drug contained in said packages so labeled is entirely worthless and without effect either in whole or in part as a cure for cancer and for killing and removing cancer and in healing the cancer sore, as he, the said O. A. Johnson, then and there well knew, contrary to the form of statute in such cases made and provided and against the peace and dignity of the United States.

The basis of the opinion of the court below quashing this indictment was that this sort of evil did not fall within the intendment of the statute and was, therefore, not covered by the general language which seemed to include it (fol. 29).

The following is the statute in its entirety, section 8 being the specific section directly concerned:

THE FOOD AND DRUGS ACT, JUNE 30, 1906.

AN ACT For preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be unlawful for any person to manufacture within any Territory or the District of Columbia any article of food or drug which is adulterated or misbranded, within the meaning of this act; and any person who shall violate any of the provisions of this section shall be guilty of a misdemeanor, and for each offense shall, upon conviction thereof, be fined not to exceed five hundred dollars or shall be sentenced to one year's imprisonment, or both such fine and imprisonment, in the discretion of the court, and for each subsequent offense and conviction thereof shall be fined not less than one thousand dollars or sentenced to one year's imprisonment, or both such fine and imprisonment, in the discretion of the court.

SEC. 2. That the introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or from any foreign country, or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded, within the meaning of this act, is hereby prohibited; and any person who shall ship or deliver for shipment from any State or Territory or the District of Columbia to any

other State or Territory or the District of Columbia, or to a foreign country, or who shall receive in any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or foreign country, and having so received, shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person, any such article so adulterated or misbranded within the meaning of this act, or any person who shall sell or offer for sale in the District of Columbia or the Territories of the United States any such adulterated or misbranded foods or drugs, or export or offer to export the same to any foreign country, shall be guilty of a misdemeanor, and for such offense be fined not exceeding two hundred dollars for the first offense, and upon conviction for each subsequent offense not exceeding three hundred dollars or be imprisoned not exceeding one year, or both, in the discretion of the court: *Provided*, That no article shall be deemed misbranded or adulterated within the provisions of this act when intended for export to any foreign country and prepared or packed according to the specifications or directions of the foreign purchaser when no substance is used in the preparation or packing thereof in conflict with the laws of the foreign country to which said article is intended to be shipped; but if said article shall be in fact sold or offered for sale for domestic use or consumption, then this proviso shall not exempt said article from the operation of any of the other provisions of this act.

SEC. 3. That the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor shall make uniform rules and regulations for carrying out the provisions of this act, including the collection and examination of specimens of foods and drugs manufactured or offered for sale in the District of Columbia, or in any Territory of the United States, or which shall be offered for sale in unbroken packages in any State other than that in which they shall have been respectively manufactured or produced, or which shall be received from any foreign country, or intended for shipment to any foreign country, or which may be submitted for examination by the chief health, food, or drug officer of any State, Territory, or the District of Columbia, or at any domestic or foreign port through which such product is offered for interstate commerce, or for export or import between the United States and any foreign port or country.

SEC. 4. That the examinations of specimens of foods and drugs shall be made in the Bureau of Chemistry of the Department of Agriculture, or under the direction and supervision of such Bureau, for the purpose of determining from such examinations whether such articles are adulterated or misbranded within the meaning of this act; and if it shall appear from any such examination that any of such specimens is adulterated or misbranded within the meaning of this act, the Secretary of Agriculture shall cause notice thereof to be given to the party from whom such sample was ob-

tained. Any party so notified shall be given an opportunity to be heard, under such rules and regulations as may be prescribed as aforesaid, and if it appears that any of the provisions of this act have been violated by such party, then the Secretary of Agriculture shall at once certify the facts to the proper United States district attorney, with a copy of the results of the analysis or the examination of such article duly authenticated by the analyst or officer making such examination, under the oath of such officer. After judgment of the court, notice shall be given by publication in such manner as may be prescribed by the rules and regulations aforesaid.

SEC. 5. That it shall be the duty of each district attorney to whom the Secretary of Agriculture shall report any violation of this act, or to whom any health or food or drug officer or agent of any State, Territory, or the District of Columbia shall present satisfactory evidence of any such violation, to cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States, without delay, for the enforcement of the penalties as in such case herein provided.

SEC. 6. That the term "drug" as used in this act shall include all medicines and preparations recognized in the United States Pharmacopœia or National Formulary for internal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either

man or other animals. The term "food" as used herein shall include all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed, or compound.

SEC. 7. That for the purposes of this act an article shall be deemed to be adulterated:

In case of drugs:

First. If, when a drug is sold under or by a name recognized in the United States Pharmacopœia or National Formulary, it differs from the standard of strength, quality, or purity, as determined by the test laid down in the United States Pharmacopœia or National Formulary official at the time of investigation: *Provided*, That no drug defined in the United States Pharmacopœia or National Formulary shall be deemed to be adulterated under this provision if the standrad of strength, quality, or purity be plainly stated upon the bottle, box, or other container thereof although the standard may differ from that determined by the test laid down in the United States Pharmacopœia or National Formulary.

Second. If its strength or purity fall below the professed standard or quality under which it is sold.

In the case of confectionery:

If it contain terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health, or any vinous, malt, or spirituous liquor or compound or narcotic drug.

In the case of food:

First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

Second. If any substance has been substituted wholly or in part for the article.

Third. If any valuable constituent of the article has been wholly or in part abstracted.

Fourth. If it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed.

Fifth. If it contains any added poisonous or other added deleterious ingredient which may render such article injurious to health: *Provided*, That when in the preparation of food products for shipment they are preserved by any external application applied in such manner that the preservative is necessarily removed mechanically, or by maceration in water, or otherwise, and directions for the removal of said preservative shall be printed on the covering or the package, the provisions of this act shall be construed as applying only when said products are ready for consumption.

Sixth. If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter.

SEC. 8. That the term "misbranded," as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or

device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

That for the purposes of this act an article shall also be deemed to be misbranded:

In case of drugs:

First. If it be an imitation of or offered for sale under the name of another article.

Second. If the contents of the package as originally put up shall have been removed, in whole or in part, and other contents shall have been placed in such package, or if the package fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any such substances contained therein.

In the case of food:

First. If it be an imitation of or offered for sale under the distinctive name of another article.

Second. If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so, or if the contents of the package as originally put up shall have been removed in whole or in part and other contents shall have been placed in such package, or if it fail to bear a statement on the label of the quantity or proportion of

any morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any of such substances contained therein.

Third. If in package form, and the contents are stated in terms of weight or measure, they are not plainly and correctly stated on the outside of the package.

Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular: *Provided*, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word "compound," "imitation," or "blend," as the case may be, is plainly stated on the package in which it is offered for sale: *Provided*, That the term blend as used herein

shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only: *And provided further*, That nothing in this act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas, except in so far as the provisions of this act may require to secure freedom from adulteration or misbranding.

SEC. 9. That no dealer shall be prosecuted under the provisions of this act when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party residing in the United States, from whom he purchases such articles, to the effect that the same is not adulterated or misbranded within the meaning of this act, designating it. Said guaranty, to afford protection, shall contain the name and address of the party or parties making the sale of such articles to such dealer, and in such case said party or parties shall be amenable to the prosecutions, fines, and other penalties which would attach, in due course, to the dealer under the provisions of this act.

SEC. 10. That any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this act and is being transported from one State, Territory, district, or insular possession to another for sale, or, having been transported, remains unloaded, un-

sold, or in original unbroken packages, or if it be sold or offered for sale in the District of Columbia or the Territories, or insular possessions of the United States, or if it be imported from a foreign country for sale, or if it is intended for export to a foreign country, shall be liable to be proceeded against in any district court of the United States within the district where the same is found and seized for confiscation by a process of libel for condemnation. And if such article is condemned as being adulterated or misbranded, or of a poisonous or deleterious character, within the meaning of this act, the same shall be disposed of by destruction or sale, as the said court may direct, and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Treasury of the United States, but such goods shall not be sold in any jurisdiction contrary to the provisions of this act or the laws of that jurisdiction: *Provided, however,* That upon the payment of the costs of such libel proceedings and the execution and delivery of a good and sufficient bond to the effect that such articles shall not be sold or otherwise disposed of contrary to the provisions of this act or the laws of any State, Territory, district, or insular possession, the court may by order direct that such articles be delivered to the owner thereof. The proceedings of such libel cases shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in any such case, and all

such proceedings shall be at the suit of and in the name of the United States.

SEC. 11. The Secretary of the Treasury shall deliver to the Secretary of Agriculture, upon his request from time to time, samples of foods and drugs which are being imported into the United States or offered for import, giving notice thereof to the owner or consignee, who may appear before the Secretary of Agriculture, and have the right to introduce testimony, and if it appear from the examination of such samples that any article of food or drug offered to be imported into the United States is adulterated or misbranded within the meaning of this Act, or is otherwise dangerous to the health of the people of the United States, or is of a kind forbidden entry into, or forbidden to be sold or restricted in sale in the country in which it is made or from which it is exported, or is otherwise falsely labeled in any respect, the said article shall be refused admission, and the Secretary of the Treasury shall refuse delivery to the consignee and shall cause the destruction of any goods refused delivery which shall not be exported by the consignee within three months from the date of notice of such refusal under such regulations as the Secretary of the Treasury may prescribe: *Provided*, That the Secretary of the Treasury may deliver to the consignee such goods pending examination and decision in the matter on execution of a penal bond for the amount of the full invoice value of such goods, together with the duty thereon, and

on refusal to return such goods for any cause to the custody of the Secretary of the Treasury, when demanded, for the purpose of excluding them from the country, or for any other purpose, said consignee shall forfeit the full amount of the bond: *And provided further*, That all charges for storage, cartage, and labor on goods which are refused admission or delivery shall be paid by the owner or consignee, and in default of such payment shall constitute a lien against any future importation made by such owner or consignee.

SEC. 12. That the term "Territory" as used in this act shall include the insular possessions of the United States. The word "person" as used in this act shall be construed to import both the plural and the singular, as the case demands, and shall include corporations, companies, societies, and associations. When construing and enforcing the provisions of this act, the act, omission, or failure of any officer, agent, or other person acting for or employed by any corporation, company, society, or association, within the scope of his employment or office, shall in every case be also deemed to be the act, omission, or failure of such corporation, company, society, or association as well as that of the person.

SEC. 13. That this act shall be in force and effect from and after the first day of January, nineteen hundred and seven.

Approved, June 30, 1906.

SPECIFICATION OF ERRORS.

The errors specified for particular attention are assignments 6, 7, and 8, as follows (fol. 35):

6. The court erred in holding that the intendment of the statute upon which said indictment is founded is restricted to protecting the public health against adulterated, poisonous, and deleterious foods and drugs.

7. The court in its decision and judgment quashing said indictment erred in its construction of the term "misbranding" as used in said act.

8. The court in its decision and judgment quashing said indictment, and each and every count thereof, erred in its construction of the language, "the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein, which shall be false or misleading in any particular," as used in said act.

THE ARGUMENT.

Our line of argument is summarized by the index at the beginning of this brief.

FIRST.

The acts charged in the indictment fall within the letter of the statute.

Our understanding is that this proposition will not be controverted, and that it was recognized by the court below, whose decision was that the general

language must be restrained by construction to exclude these offenses.

Section 2 of the act makes it a misdemeanor for any person to ship any article of "drugs" which is "misbranded within the meaning of this act."

Section 6 defines the word "drugs" as used in the act to include, among other things, "any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either man or animals."

Section 8 defines the word "misbranded" as used in the act to apply, among other things, to "all drugs" * * * "the package or label of which shall bear *any statement, design, or device regarding such article or the ingredients or substances contained therein which shall be false or misleading in any particular.*"

General language could scarcely be more explicit to hit the very acts or statements charged in this indictment.

Unless, therefore, these general clauses are to be restricted by construction, the case falls within them. It was the view of the court below that the indictment was not within the intendment of the act and that the general words were restricted by various considerations which will now be discussed.

Counsel for defendant in error attempt to establish that the words "such article" in the middle of the first paragraph of section 8 do not refer to "drugs" at all but only to "article of food or articles which enter into the composition of food" and that therefore as to drugs "misbranding" has reference only to statements regarding the ingredients or substances of the drug. (Brief and argument for defendant in error, p. 14.) But such a construction would really render the section wholly inapplicable to drugs at all and it is clearly erroneous, as may be seen on a short analysis.

Thus (1) in the clause "the package or label of which," the word "which" is certainly related to the word "drugs" and (2) in the clause "regarding such article, or the ingredients or substances contained therein," the word "therein" as certainly refers to "such article" and to nothing else. This is true merely as a matter of reading the English language grammatically.

Now, in view of the above, if "such article" were taken as referring only to "articles of food, or articles which enter into the composition of food," the section is robbed of all effect as to drugs and the opening declaration that "the term 'misbranded' as used herein shall apply to all drugs" is rendered wholly meaningless.

[Defendant's brief was received just before the Government's brief was finally printed.]

71266—11. (To face page 18.)

SECOND.

The matters here charged are not to be carved out of the statute as being not within its purposes; for they are both injurious to health and frauds on the public, and therefore they fall within the scope of the act in both of its purposes.

A.

Even if the public health had been the sole concern of the statute the matters charged in the indictment would have fallen within its intendment.

The court below was in error, we think, in holding that frauds on the purses of the public were not a part of the purpose of the statute; but even if the protection of health had been the only purpose, these cure-all advertisements are within it.

This very point was expressly stated in the public campaign which went on contemporaneously with the passage of the bill through Congress. For instance, in its issue of January 13, 1906, Collier's Weekly said:

> Other (of the patent consumption cures) are comparatively harmless in themselves, but by their fervent promises of rescue they delude the sufferer into misplacing his reliance and forfeiting his only chance by neglecting those rigidly careful habits of life which alone can cure the 'white plague,' one and all the men who advertise medicines to cure consumption deliberately traffic in human life.

The present case affords an even clearer illustration of the relation between these cure-all labels and the public health. The only cure for cancer as yet dis-

covered by any man (excepting "Dr." O. A. Johnson) is surgical intervention, and that can save the patient only if availed of at the very inception of the disease. What is the object of Dr. Johnson's beguiling labels stating that the contents of his bottles will destroy and remove cancer? Is it not to induce the victims of cancer to rely upon the labels, and to use the "remedy?" And do not the labels depend upon and encourage the weak human impulse of the victim to conceal the disease from his physician and his friends and nurse it in secret? Meanwhile the cancer is permitted to spread beyond the possibility of cure.

These illustrations, while possibly extreme cases, nevertheless represent cases which do exist, and represent an evil which is inherent in the whole field.

Generally, human science at best is but too weak in its struggle with disease and can little afford to carry the added handicap of self-doctoring and delay.

B.

Cheats and frauds were, however, among the principal mischiefs denounced by the act, as is shown not only by explicit provisions of the act but by the committee reports and congressional debates upon it and by the purport of other acts in pari materia.

I. The act itself, in several clauses, denounces mischiefs which involve only frauds upon the purchaser.

Articles "falsely branded as to the State, Territory, or country in which manufactured or produced;"

articles substituted in packages for the original contents thereof (irrespective of any poisonous or deleterious character of the substitutes); articles in "imitation of or offered for sale under the name of another article;" articles of food as to which the labels misrepresent the weight or measure; articles of food "labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so," are all explicitly denounced by section 8. That section also, in its concluding proviso, directs that articles of food which do not "contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded" if they fall within certain specified conditions, thereby plainly indicating that even such articles, not poisonous or deleterious, are intended to be within the statute unless within the stated exception, while the conditions themselves which would bring the articles within the exception could have been framed with no other purpose than to prevent fraudulent practices in labelling goods. One condition is that in the case of compounds, imitations, and blends the words "compound," "imitation," or "blend," as the case may be, shall be plainly stated on the package that is offered for sale.

Again, articles of food are denounced by section 7 as adulterated if mixed with any substance "so as to reduce or lower or injuriously affect" quality or strength, or if involving substitution of another article, or "if mixed, colored, powdered, coated, or

stained in a manner whereby damage or inferiority is concealed," and *in addition* if containing "any added poisonous or other added deleterious ingredient which may render such article injurious to health," which latter specification shows that the former specifications are not dependent upon injuriousness to health.

These provisions, indicating clearly that frauds on the purses of the public were among the mischiefs denounced by the act, were not analyzed by the court below, and they remove the principal basis of its opinion.

Nor does the title of the act, upon which the court largely relied, limit the policy shown by these clauses. That title is—

> An act for preventing the manufacture, sale, or transportation of adulterated *or misbranded or* poisonous *or* deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes.

The court below construed this as if it had read: "Adulterated or misbranded *in respect to being* poisonous or deleterious."

II. That frauds on the pockets of the public were among the mischiefs sought to be reached by the act is further shown by the congressional reports and by the debates in Congress, to which reference is made in order to show what the evil was which the legislature intended to remedy. (*Jennison* v. *Kirk*, 98

U. S., p. 459; *Holy Trinity Church* v. *United States*, 143 U. S., p. 465; *American Net etc. Co.* v. *Worthington*, 141 U. S., p. 473; *Binns* v. *United States*, 194 U. S., 486, 495, 496; *Blake* v. *National Banks*, 23 Wall., 307, 319.)

The court below was greatly influenced by considerations which were expressed in its opinion as follows:

> In the debates in Congress when this measure was under consideration it was never sought to be justified except on the ground of protecting the public health as it might be affected by interstate shipments of food, drugs, etc.

The court could not have had before it the complete reports and debates, for they show the contrary of this impression beyond any possible question. In reporting the bill which eventually became the present act, the House committee stated (59 Cong., 1st sess., H. Rept. No. 2118, to accompany S. 88):

> From a careful study of the data which have been considered by the committee through extensive hearings in this and former Congresses, it is certain that there is an immense amount of *deception, fraud, and deliberate swindling* practiced by the misbranding of food products. False and misleading claims are often found attached as a part of the label to food products. * * * The pending measure forbids the entry into interstate commerce of such fraudulent labels and misleading descriptions.

> The penalties of the bill are aimed at *cheats*. That which is forbidden is the sale of goods under *false pretenses*, or the sale of poisonous articles as good food. No honest dealer need fear any provision in the bill. Legitimate trade should welcome its enactment into law. Only those wishing to deceive the public will object to its provisions. It simply requires honesty of labeling *and* the exclusion of injurious added products" (p. 9).

The Senate committee, in reporting substantially the same bill to the preceding Congress, did not enter into any discussion of its purposes, but at the hearings, which were made a part of the report, Mr. William W. Smithers, who represented the Association of Manufacturers and Distributers of Food Products in the United States (p. 9), and who supported the bill, said (58 Cong., 2d sess., Sen. Rept. No. 1209, to accompany H. R. 6295):

> As we understand food legislation, as defined by the writers upon the subject and as limited by the decisions of the courts of last resort in the various States, the legislative authority must stop after it has arrived at these two points: The legislature has the right to say to a manufacturer or dispenser of a food product "*You shall not sell an unwholesome article;*" *and second*, "*You shall not mislead the purchaser of whatever article you may sell.*" In other words, the base rock of food legislation "is the protection of the people against unwholesome food, *and* the protection of the public against deception in the sale of a commodity" (pp. 17, 18).

Discussing in the committee the McCumber bill (S. 198, 58th Cong., 2d sess.) and the amplification of the definition of the term "drug" by adding in section 6 the words "also any substance intended to be used for the cure, mitigation, or prevention of disease," the following utterances are typical of those made by members of the committee on the point under discussion:

> Senator McCUMBER. Right here let me give you a point to answer. My questions are directed wholly for the purpose of eliciting information. Let me see one of those articles there. Take this. It is marked "Arsenauro." The manufacturer sends it out to the country as a medicine. We will suppose that it has medicinal qualities which are valuable. Now, he gets a little reputation, or he finds that he can make it a great deal cheaper, and he sends out something entirely different under the same name. It is not in the Pharmacopœia. The cheaper one is an entirely different article, as much different as maple sirup is from the burnt sugar and glucose, which they call "Vermont maple sirup," and "pure maple sirup." How would you reach him? It seems to me this added definition is to reach *frauds* that will be perpetrated in drugs not mentioned in the Pharmacopœia, and nothing else (p. 85). * * * I can not quite understand how the retail druggist can have any fear of that kind, when this bill can not in any way, shape, or manner reach him or interfere with his business in any way. It can not reach the whole-

> saler unless he ship the articles into a foreign State. It is designed to reach back only to the *frauds* of the manufacturer himself. The manufacturer might have some fear, especially if he was manufacturing a *fraudulent* article, but the main fear is on the part of, and that which seems to be urged more than anything else is the danger to, the retail druggist, when by no possibility can the bill touch him or reach him (p. 87). * * *

In the preceding Congress, still in reference to the introduction of substantially the same bill, the Senate Committee on Manufactures submitted an elaborate report (57 Cong., 1st sess., S. Rept. No. 972, to accompany S. 3342), the pertinent portions of which as to this point are as follows:

> During the last quarter of the century the growth of *commercial frauds*, of adulterations in food and dairy products and in drugs and liquors, has become so alarming that both the State and Federal Governments have been called upon for legislation to protect the public health from harmful and deleterious foods *and the people from frauds and cheats* (p. 1).
>
> * * * For more than ten years petitions have been pouring upon Congress—petitions from a *swindled* and outraged populace—asking for concurrent legislation supplementing the efforts of the States to eradicate this ever-growing evil and to close up every avenue whereby the perpetrators of this crime might escape * * * (pp. 1, 2).

EFFECT ON PUBLIC HEALTH.

The greater portion of adulterations are not usually injurious to the average person—at least the injury is not immediately perceptible. They are, however, serious impediments to restoration of health when one is required, by reason of any chronic weakness, to partake of foods of special properties and abstain from others, where he has no surety of the verity of the articles purchased.

EFFECT ON COMMERCE.

Equally serious is the demoralizing effect on the commerce of the country. As long as these spurious nostrums are sold at enormous profits which enrich the unscrupulous and dishonest, the fair, honest goods are forced by this competition to go begging for meager profits, and in many instances are forced out of the markets, and the honest dealer compelled to quit business.

Both producer and consumer suffer. The producers of food products—the entire agricultural population—suffer immeasurable hardships and wrongs when their honest, homemade products, their butter, their fruits and jellies, their sirups and sugars, come into competition with counterfeits whose cost is but slight and whose selling price is 95 per cent clear profit.

The other half of the community suffer the imposition of this continuous stream of spurious *frauds* upon their *stomachs and purses.* And all this is for the benefit only of a few

hundred manufacturers, whose sole objection to the proposed legislation is that it will injure their business (p. 3.)

From the hearings, which were made a part of this report, the following passages are particularly illuminating:

The CHAIRMAN:

Q. Well, granting that Congress has the right to exercise the power to protect the health of the people, do you deny that it has the right to go further and protect the *pocketbooks* of the people from *fraud* and imposition?

A. We object to doing it under the guise of food legislation. (P. 29.)

* * * * *

Mr. NEWTON (representing the Commercial Exchange of Chicago). Now, the next matter that I wish to touch on simply is the question of *fraud*. I want to say to you, gentlemen, we are not down here defending fraud—not in any manner, shape, or form. I imagine it is much overdrawn, that term, but I am not here pleading before your committee or Congress to protect fraud or support fraud. Fraud remains fraud, but I do want to say there is a good deal of difference—to come down to the point—there are second and third grades of an article, and the price designates a good deal the article. (P. 45.)

Mr. Alexander J. Wedderburn, who was one of the prime movers of the bill (p. 83), said:

* * * What need can there be of more delay, gentlemen, except to permit this character of fraud to continue at the expense of the

> *health, the pockets*, the commerce, and the morals of our country? (P. 93.)

And in the same hearing Dr. Wiley said (p. 110):

> I agree with you [the chairman] that the evils of food adulteration are less in the way of deleterious substances than in the way of frauds—almost infinitely less, in fact.

III. Other statutes *in pari materia* indicate the same policy to deal not only with health but with frauds.

Act July 1, 1902 (32 Stat. L., 632), "False labeling of place of origin forbidden."

Revised Statutes, section 2934, "Forfeiture of imported medical preparations not labeled with the true name of manufacturer and place of preparation."

Act March 3, 1905 (33 Stat. L., 874), "False label or branding, either as to their contents or as to their place of manufacture or production."

Third. Nor are the matters charged to be carved out of the statute as not being within its intent as indicated by the legislative history of the enactment; on the contrary, that history affirmatively shows that this very evil was considered and discussed and intended to be covered.

Here, as in his general conclusion that the act did not touch fraud at all, the decisive consideration in the mind of the court below was his impression that this particular sort of evil was not referred to in the congressional debates. The court said as to this:

> At no time was it asserted or pretended that it was proposed to reach the matter of holding

> the manufacturers and vendors of prescriptive or patented medicines, multifarious and multiform as they are, to criminal liability for misstatements as to the curative or remedial effects of the prescription, which would necessarily depend upon the opinions of contending experts and the users of the nostrums (fol. 29).

On the contrary, not only the debates in Congress but the proceedings before the committees explicitly show the contemplation of this very kind of fraud in patent-medicine labels.

A.

As soon as it was proposed to extend the definition of the word "drug" so as to include patent medicines, opposition arose on this very ground, that misrepresentations of curative properties would be covered. The discussion affirmatively showed that this was intended, and the opposition failed.

In the earlier proposed bills from which the present act was derived (58th Cong., 2d sess., sec. 5, House bill No. 6295, 58th Cong., 2d sess., p. 34, and in sec. 5 of Senate bill No. 3342 of the 1st session of the 57th Congress, Sen. Rep. No. 972) the proposed definition of the term "drug" was given as follows:

> Section 5 (later section 6). That the term "drug" as used in this act shall include all medicines and preparations recognized in the United States Pharmacœpia for internal or external use.

Under this definition patent medicines obviously would not have been included, and therefore, so long

as that form of definition continued, no controversy arose as to representations of curative properties, for such representations are not made by the regular medical profession.

This definition was, however, enlarged by the McCumber bill, known as Senate bill 198, by the addition of the following clause:

> Also any substance to be used for the cure, mitigation, or prevention of disease. (58th Cong., 2d sess., Sen. Rep. No. 1209, pp. 4–68.)

It is interesting and instructive to observe that immediately upon this enlargement of the definition, and consequent inclusion within the subject of the bill of patent medicines, there arose a pronounced opposition, first upon an apparently artificial ground, that confusion would result from this enlargement because prepared patent medicines have no standard of purity, and therefore could not be "adulterated." The hearings before the committee (58th Cong., 2d sess., S. Rept. 1209) were for a long time limited in their subject to the discussion of this purely academic artificial question.

That discussion having failed of success, however, the real objection on behalf of the patent medicine people was more or less accidentally revealed. The following interesting discussion occurred between the chairman and representatives of the retail druggists (58th Cong., 2d sess., S. Rept. 1209, pp. 97–100):

> The CHAIRMAN. I have a very good illustration right here in my hand. Here is a bottle marked "Pepto Mangan." It says, "Does not

affect the teeth." There is a statement as to the truth of which the purchaser is entitled to know. This bill provides that if that statement is untrue it shall be a contraband article. What objection is there to it, supposing it does affect the teeth?

Mr. GALLAGHER. Some of the gentlemen have contended that the clause you have just quoted would apply only to the ingredients and not to the use of the article.

The CHAIRMAN. If it does affect the teeth, the statement on the bottle would be a misstatement.

Mr. GALLAGHER. Does it cover the use of the article as well as the ingredients?

The CHAIRMAN. It will cover the question as to the truth of any statement in regard to the contents of the bottle. If the label says, "The contents of this bottle will not affect the teeth injuriously," and that is not true, under this bill it becomes a contraband article.

Mr. KLINE. I do not want to interrupt Mr. Gallagher all the time, but I should like to answer your questions as I go along. There is a good deal of idiosyncrasy in the matter of teeth as there is in the matter of the stomach. I may say, as my friend Doctor Wiley well knows, that we make the only infant food fit for use by all infants, but I know perfectly well it is not true, because there are certain idiosyncrasies of the stomach when this food which I manufacture will not be tolerated. It is possible there may be some condition during which the woman or the man may imagine that her or his teeth are affected by the use

of Pepto Mangan, and it is possible right there to hold up a whole lot of people on a presumption which finally, after it is brought up in court, as it would have to be eventually tried, would prove to be groundless.

You are furnishing the very evidence I want to present to your minds, that a whole lot of questions are likely to be raised under such statements as those in this provision which will do nobody any good and lead to endless litigation, and for the present would lead to intense opposition to the passage of the bill.

The CHAIRMAN. We will take Glyco Thymoline. There are a good many things stated upon this package. The purchaser takes the statement to be true. It states what the medicine will do. Suppose that statement is untrue. Then the article becomes contraband under this proposed law. Should it not be so?

Mr. DOUGLAS. May I be permitted to say a word?

The CHAIRMAN. Certainly.

Mr. DOUGLAS. That is one of the things in the bill to which I wish to call attention. Medicine and theology have been fought over for hundreds of years and the battle still seems to rage, and one objection which many of our people have to the bill is based upon the very provision to which the chairman has referred—any "statement (which) shall be * * * misleading in any particular." The language "any statement (which) shall be * * * misleading in any particular" is so broad, so sweeping, so comprehensive that it would give

rise to controversies in every State and Territory in the Union.

The CHAIRMAN. From what line of the bill do you read?

Mr. DOUGLAS. Line 22, section 5, page 4.

The CHAIRMAN. Can you give any reason why the bill should not protect people against misleading or false statements?

Mr. DOUGLAS. If false, that is different. If the provision undertook to punish or prohibit the handling of goods upon which it was stated that the package does contain something which it does not contain, then the manufacturers would know what they are about.

The CHAIRMAN. It says, "which statement is false."

Mr. DOUGLAS. "Or misleading." You must take the most comprehensive word to get the scope of the language, "which statement shall be false or misleading in any particular." Who is to determine?

The CHAIRMAN. The court.

Mr. DOUGLAS. But the court determines it upon the testimony of experts, and they proverbially differ. There are different schools of medicine——

The CHAIRMAN. Your colleague has just furnished an example here by reading a statement where an expert said that certain conditions would flow from the use of a certain medicine, and the patient died before the ink was dry on the paper containing his statement. That was a misleading statement and a serious one.

Mr. DOUGLAS. If the committee were to accept the belief of the followers of Dr. Dowie, every statement made by every physician is a misleading statement, because they do not believe in any medicine at all. There are certain statements in regard to certain remedies which are controverted by one school of medicine and advocated by another.

Senator MCCUMBER. I think you misunderstand the real meaning of the second provision: "If the package containing it, or its label, shall bear any statement regarding the ingredients or the substances contained therein, which statement shall be false or misleading in any particular."

It is not as to what those ingredients will produce, or the effect of those ingredients, but what the ingredients are. You can not say, for instance, that you put in ethyl alcohol when you put in wood alcohol. That would be a misstatement of its ingredients.

Mr. DOUGLASS. That is not what we complain of. We complain that the language is so broad that it would do just what the chairman suggested. Suppose you placed on the bottle the statement, "There are no harmful ingredients in this package."

The CHAIRMAN. That is what it says. It says, in effect, there are no harmful ingredients.

Mr. DOUGLASS. The two schools of medicine might differ radically as to the truth of that statement. That very thing opens up an absolutely unlimited field of controversy throughout the country.

Naturally, the suggestion of the "cure-all" evil put patent-medicine people in a very difficult position. They could not make direct opposition on that feature without showing an interest in a privilege to make false statements of curative properties. The efforts of the opponents were limited to efforts to strike out the enlarging clause from the definition of the word "drugs," and they did not make any claim to have statements as to curative properties expressly and directly eliminated from the application of the act. In this regard the following petition filed with the Fifty-seventh Congress is significant:

NATIONAL REMEDY COMPANY,
New York, December 15, 1904.

To Hon. JOHN F. DRYDEN:

We earnestly request your attention to a very serious objection to the proposition of the Senate Committee on Manufactures to enlarge the definition of the term "drug" in the pending pure-food bill. The definition in the bill as passed by the House is entirely satisfactory to all branches of the drug trade, but the proposed enlargement of this definition is objectionable from every standpoint, and would be sure to produce much trouble, controversy, confusion, and hardship. Other branches of the drug trade have their own objections to this proposition. Our objections are stated in the inclosed printed memorandum, to which we beg you to give just as much weight as if it were written out in full in this letter. We endeavor to comply with every law, and to

meet all our obligations to the public and to our customers, but we can see no reason why Congress should adopt this proposed amendment, the chief outcome of which is certain to be much trouble, without any compensating advantages to the public. We earnestly ask you to kindly use your influence to see that the drug definition in this bill be allowed to stand as it came from the House.

Very respectfully, yours,

NATIONAL REMEDY COMPANY,
G. A. RISLEY, *Pres. & G. M.*

The "inclosed printed memorandum" was as follows:

Memorandum concerning the definition of the term "drug" in the pure-food bill as recommended by the Senate Committee on Manufactures.

The Senate Committee on Manufactures recommended a substitute for the House pure-food bill. This substitute contains one feature which was adopted by a majority of the committee over the protest of every branch of the drug trade in the United States, manufacturers, wholesalers, and retailers.

The bill relates to both food and drugs, and the crucial point, so far as drugs are concerned, is the definition of the term "drug." The House bill provides:

"That the term 'drug' as used in this act, shall include all medicines and preparations recognized in the United States Pharmacopœia for internal or external use."

The Senate committee proposes to extend this definition by adding to it the following sweeping words:

"Also any substance intended to be used for the cure, mitigation, or prevention of disease."

The definition is vital for the reason that it determines the scope and effect of all the other provisions in the bill relating to drugs.

As the Pharmacopœia covers practically all the elemental and standard drugs used in compounding medicines, the House bill applies to all that class of drugs, and the sentiment is absolutely unanimous that this is as far as legislation should go. The definition of the term "drug" proposed by the Senate committee would immediately bring under the bill every eyewash, soothing sirup, suppository, salve, tooth powder, pill, lotion, liniment, or plaster for man and beast. In earnest protest against this proposition as burdensome, vexatious, and unnecessary, the wholesale and retail drug organizations of the United States, during the last winter and spring, sent repeated petitions and delegations to Washington. The objections of the wholesale and retail trade rest upon special grounds, and have been strongly stated. The purposes of this memorandum is to explain simply the objections to the proposition from the manufacturers' standpoint.

The cure of diseases is not, and never can be, an exact science. Medicine, like theology, has ever been the object of heated controversy and the battle still rages. Upon a thousand

points opinion is sharply divided, even among able men; so much so, that the conflicting testimony of experts has become a subject of ridicule. Intense prejudices exist between representatives of different schools of medicine, and diametrically opposed views are held as to the effects and therapeutic properties of different drugs. Bearing this fact in mind and remembering that the Senate definition of drug covers every conceivable domestic or household remedy for man and beast, the following provision of section 5 calls for the most serious consideration:

"That such drug shall be deemed to be misbranded if the package containing it or its label shall bear any statement *regarding* the ingredients or the substances contained therein, which statements shall be false or misleading in any particular."

Who is to determine whether a statement regarding a medicine is misleading in any particular? The words sound all right, but as applied to medicine they would promote controversy without end, and furnish a perennial harvest for a class of professional mischief makers who literally swarm in many communities. Pass such a law and let these fellows start on their hunt, and no manufacturer in the community will be safe from malicious attack. Statements concerning the merits and therapeutic properties of the contents are to be found upon the wrappers and labels of hundreds and thousands of medicines. Take the package of some well-known domestic or proprietary remedy, bearing the statement: "This

medicine contains no harmful ingredients," or "This is a simple and harmless remedy," or any one of a hundred of other phrases in common use. Some one with a spite against the manufacturer or with a desire to blackmail him brings out the omnipresent expert to prove that the medicine is bad for the health, and immediately the entire business and reputation of the manufacturer is put in jeopardy by a controversy over a mere question of opinion. The nature of the controversies it is proposed to invite was very clearly indicated by the honorable chairman of the Senate committee, at one of the hearings on this bill, as shown at pages 97, 98 of the printed report:

"The CHAIRMAN. I have a very good illustration right here in my hand. Here is a bottle marked 'Pepto Mangan.' It says 'does not affect the teeth' * * *. This bill provides that if that statement is untrue it shall be * * *. If the label says 'The contents of this bottle will not affect the teeth injuriously,' and that is not true, under this bill it becomes a contraband article. * * * We will take Glyco Thymoline. There are a good many things stated upon this package. The purchaser takes the statement to be true. It states what the medicine will do. Suppose that statement is untrue, then the article becomes contraband under this proposed law."

In other words, if the label on a certain homeopathic medicine states that it is a cure for grippe, and some allopathic physician comes along and denies it, the question

immediately becomes an issue for the Federal Government to settle, under the guise of regulating commerce. It is surely a serious matter for the Federal Government to invite and undertake to settle disputes over the merits of medicines in forty-five States; wherever such questions are of any public concern, they are matters which the State governments are fully able to deal with. As applied to elemental and standard drugs "recognized in the United States Pharmacopœia," there can be no special objections to any of the drug provisions in the bill, but if the definition of the word "drug" can be extended to cover every conceivable thing which by any possibility can be called a medicine, then the subsequent provisions of the bill become at once loaded with unlimited possibilities of litigation, vexation, and trouble, and manufacturers will be placed at the mercy of the cranks and "hold-up men" in every part of the Union. In the absence of some great emergency or overwhelming public demand, it is difficult to see any good reason why the Federal Government should deliberately open up such an illimitable field of trouble and controversy as the proposed enlargement of the term "drug" in the bill now before the Senate would invite.

The enlarged definition of "drugs" nevertheless remained and became law.

B.

The amendment to the bill changing the definition of misbranding so as to cover not merely "any statement regarding the ingredients or substances contained in the article," but statements regarding the article itself, was made as a result of doubt whether this sort of thing would otherwise be covered.

It will be noticed in the dialogue above quoted from the committee hearings that when the chairman said that false statements concerning curative properties of patent medicines were denounced by the bill, Senator McCumber doubted the chairman's view (ibid., pp. 98–99), on the ground that the bill said "any statement regarding ingredients or the substances," and therefore implied a limitation to statements concerning the identity of the contents of the article rather than the qualities of the article itself.

When the bill (Senate No. 88) was reported from the Committee on Manufactures in the following Congress, and came into the Senate, further discussion occurred on the application of the act to misrepresentations of curative properties, the discussion being addressed to the above-quoted statement of the chairman concerning Pepto Mangan and Glycothymoline (40 Cong. Rec., pt. 3, pp. 2724–2728).

Suggesting that the misbranding should relate only to statements concerning the identity of the ingredients and not to the curative properties of the article, Senator Hemenway moved an amendment to make the definition read as follows:

> Any statement regarding the existence or nonexistence or the amount or purity of any

ingredient or substance contained therein, which statement shall be false or misleading in any particular (p. 2724).

And in connection with this motion he had read the following letter (p. 2724):

THE NEW WILLARD,
Washington, D. C., February 20, 1906.

Hon. J. A. HEMENWAY,
United States Senate, Washington, D. C.

DEAR SIR: I sincerely trust that your proposed amendment to Senate bill 88 will meet with the approval of the Senate. Every honest man is opposed to the adulteration or false labeling of drugs; but this bill, in the definition of the term "misbranded," as applicable to drugs, goes much beyond that purpose.

Section 9 provides, among other things, that a drug shall be deemed to be misbranded—

"If the package containing it, or its label, shall bear any statement regarding the ingredients or the substances contained therein which statement shall be false or misleading in any particular."

This covers very much more than misbranding or false labeling as commonly understood. Carried to its full length it means that the Federal Government, under the guise of regulating interstate commerce, is to take up and settle by its chemical experts and in the Federal courts a class of questions about which medical men and schools of medicine have been at war for generations. If it is desirable that questions concerning the curative properties of drugs should be settled by process of

law, it would seem to be a question for the States rather than for the Federal Government.

The slight change of phraseology proposed by your amendment makes the definition of the term "misbranded" more specific, and excludes the implication that statements made in good faith regarding the therapeutic qualities of medicine or its ingredients can be made the basis for denying the right to transport such drugs from State to State.

Manufacturers have had no opportunity whatever for a hearing upon this or other questions before the honorable committee at the present session of the Senate; but at the hearing before the honorable committee during the second session of the last Congress this question was discussed, and the honorable chairman of the committee, in explaining some of the purposes of the bill, said:

I have a very good illustration right here in my hand. Here is a bottle marked "Pepto Mangan." It says: "Does not affect the teeth." There is a statement as to the truth of which the purchaser is entitled to know. This bill provides that if that statement is untrue it shall be a contraband article. What objection is there to it, supposing it does affect the teeth?

And again:

We will take Glyco Thymoline. There are a good many things stated upon this package. The purchaser takes the statement to be true. It states what the medicine will do. Suppose that statement is untrue. Then the article

becomes contraband under this proposed law. Should it not be so? (See Senate Report No. 1209, pp. 97 and 98.)

We are bound to assume that the interpretation of the provision of the purposes of the bill by the honorable chairman of the committee is correct.

I am sure that a determination on the part of the Federal Government to take up and settle questions of this character in connection with interstate commerce would precipitate endless controversies in all parts of the country. Prosecutions would be inaugurated by the Agricultural Department, and as these prosecutions might be based in many cases upon medical questions upon which different men entertain different beliefs it would become a matter of vital importance in some cases as to what school of medicine controlled the Government department having the subject in charge.

I very earnestly hope that your proposed amendment, or something equivalent, will be adopted, so that no drug shall be deemed to be "misbranded" under this bill by reason of any statement made in good faith relating solely to the medicinal properties of the drug or its ingredients.

Very respectfully, yours,

A. R. BEARDSLEY.

Senator Hemenway made the argument which was made by the court below, founded on the idea that a mere erroneous opinion as to curative properties should not bring a person within the denunciation

of the statute. Senator McCumber concurred with Senator Hemenway and reiterated his opinion, advanced at the hearing above quoted, as follows:

> I think it is aimed only at the ingredients or substances. In other words, a statement upon the bottle or package that the article contained such and such ingredients, as is often the case, then it shall be deemed to be misbranded or adulterated if it does not contain those ingredients or substances (p. 2725).

Senator Heyburn pointed out that the "medicine becomes contraband, not because of the quality of the medicine but because the man has made an untrue statement" (p. 2724).

Senator McCumber disagreed with Senator Hemenway's amendment because it opened the gate too wide (p. 2725); and for the purpose of making the definition absolutely certain to have his (Senator Hemenway's) construction, he moved an amendment to make it read:

> Any statement as to its *constituent* ingredients or the substances contained therein (pp. 2727–2728).

Senator Hemenway thereupon withdrew his amendment (p. 2728), and on the next day the McCumber amendment was agreed to without further discussion (p. 2769).

In that form the bill was passed by the Senate (p. 2773) and went to the House.

The House committee (Cong. Rec., vol. 40, pt. 10, p. 9275) reported the bill to the House with this

definition amended back to its original form, which was—

> Any statement regarding the ingredients or substances contained in such article.

and in this form it passed the House.

Conference between the two houses was then had and the definition issued from that conference (Conference Report, Cong. Rec., vol. 40, pt. 10, p. 9686), as follows:

> Regarding *such article* or the ingredients or substances contained therein.

and in this form it finally became law.

The existence of these words "regarding such article" was apparently overlooked by the court below, and this oversight was, we think, one of the chief reasons for the decision. The oversight is shown by the following portion of his opinion, in which he quotes the clause but omits these words:

> Having regard to the intendment of the whole act, which is to protect the public health against adulterated, poisonous and deleterious foods, drugs, etc., the labeling or branding of the bottle or container as to the quantity or composition of "the ingredients or substances contained therein which shall be false or misleading" by no possible construction can be extended to an inquiry as to whether or not the prescription be efficacious or worthless to effect the remedy claimed for it.

C.

A substitute bill which was urged as preferable because it excluded misstatements of curative properties was rejected.

Senator Money at one time during the passage of the act objected to section 8 on the ground that it would prohibit false or misleading statements as to the curative or therapeutic value of drugs. He thereupon introduced a substitute bill, so framed as to avoid that feature. In his statement accompanying his substitute bill he said:

> The Heyburn bill also seeks to create a dangerous condition for the manufacturers of drugs when it attempts to regulate "any substance intended to be used for the cure, mitigation, or prevention of disease," and also states that a drug shall be deemed to be misbranded if it contains any statement false or misleading in any particular, and does not in any way determine what is meant by the term "false or misleading in any particular." This again leaves it in the hands of the Bureau of Chemistry to determine what is "false or misleading." Under such a law no man would dare to tell the qualifications of his drug, or that his medicine or preparation was good for the cure, mitigation, or prevention of a disease unless he first went to the Bureau of Chemistry and consulted them and asked them if his medicine was, in their estimation, good for the cure of that disease. They would not have to prove it under this bill, because they have a

far more effective way of driving the article off the market by giving publicity to what they determine and decide about the article. Such power should not be placed in any man's hands. (Cong. Rec., vol. 40, pt. 3, p. 2659.)

Section 16. This section aims to prevent fraud and deception in the branding of drugs and medicines as far as possible. One difference between this section and the sections of other food laws defining misbranding drugs is that this section contains nothing regarding claims made in behalf of medicines telling of their merits, etc. From the very nature of medicines, and considering the purposes for which they are intended to be used, it is difficult to make any other reasonable regulation. It is quite impossible to restrict the statements which may be made regarding such articles as proprietary preparations or medicines, because a medicine may be an excellent cure for a certain disease under certain conditions and accomplish all that is claimed for it, but under other conditions it might have no effect whatever through no fault of the medicine. It does not follow that a statement to the effect that a certain medicine will cure a certain disease is false when the medicine fails to cure the disease in all cases and under all conditions. Therefore, to incorporate into a national food law a provision the violation of which could never be proved with any degree of certainty would be very unwise and open the way for endless and hopeless litigation. (Cong. Rec., vol. 40, pt. 3, p. 2661.)

This substitute bill was rejected, and the principal bill was passed with the broad language which had been objected to.

How is it possible to say that it was the intention of Congress that the language should nevertheless have the effect of Senator Money's bill?

FOURTH.

The practice of patent-medicine concerns to make extravagant "cure-all claims" was one of the principal evils denounced in the public agitation which went on contemporaneously with the progress of the bill.

An important factor in determining the intent of Congress lies in a consideration of the evil that was aimed at in framing the act; and if the doctrine for which the *Holy Trinity Church* case (143 U. S., 465) is generally cited is to be often applied, it must become more and more necessary for the court to scrutinize such sources of information, for there is no other apparent way to prove that general language was in fact intended to cover any particular thing. Among the sources from which the identity of that evil can best be ascertained is the public agitation contemporaneous with the discussion of the bill in Congress, and the facts of this agitation being part of the history of the times can be examined as indicating the nature of the evils attacked.

U. S. v. *Pac. R. R. Co.*, 91 U. S., 72, 79.
Church of the Holy Trinity v. *U. S.*, *supra*, p. 464–5.
Smith v. *Townsend*, 148 U. S., 490.
Aldridge v. *Williams*, 3 How., 1, 24.

U. S. v. *Freight Assn.*, 166 U. S., 290.
McKee v. *U. S.*, 164 U. S., 287, 292.
Mobile R. R. v. *Tenn.*, 153 U. S., 486, 502.
Preston v. *Browden*, 1 Wheat., 115, 121.
Ex Parte Milligan, 4 Wall., 2, 114.
Hamilton v. *Rathbone*, 175 U. S., 419.
Pac. Coast S. S. Co. v. *U. S.*, 33 Ct. Cl., 36, 56.

In this particular case this agitation was crystallized in articles and editorials published by at least three conspicuous magazines of large circulation, Collier's Weekly, The Ladies' Home Journal, and the Popular Science Monthly, which had the hardihood, notwithstanding the loss of advertising, to enlighten the public as to the practices that were being employed by these manufacturers and venders of patent nostrums. An examination of these courageous publications discloses that the very matter of the so-called "cure-all" evil, which is the fundamental basis of the offenses in this indictment, was repeatedly recognized at the time as one of the greatest evils of the whole trade. Its viciousness was urged along two different lines: The one that it was a fraud on the purse of the buyer; the other that the victims of disease, while learning by experience the worthlessness of the nostrums, would postpone scientific treatment until too late.

The W. C. T. U., which also took a conspicuous part in the agitation (urging chiefly the insidious evil of alcohol in these "remedies") also pointed out the evil here in question.

Typical publications from these sources, issued contemporaneously with the progress of the bill through Congress, are gathered in the appendix to this brief.

FIFTH.

From the first enforcement of the act the officers charged by it with the duty to put it in operation have construed and applied it to include fraudulent labels of the character here involved, and this construction was uniformly acquiesced in except that the present defendant has contested it.

As this construction was contemporary and immediately after the passage of the act and under the direction of the officers charged by the act with its enforcement, it is entitled to the serious consideration of the court if otherwise they should think the statute doubtful.

In *United States* v. *Moore* (95 U. S., 760, 763) the grounds for this rule are stated as follows:

> The officers concerned are usually able men and masters of the subject, and not infrequently they are the draftsmen of the laws they are afterwards called upon to interpret.

This language was quoted with approval in *Heath* v. *Wallace* (138 U. S., 573, 582), and *Hastings Company* v. *Whitney* (132 U. S., 357, 366).

In the *Five Per Cent Cases* (110 U. S., 471) weight was given to—

> the contemporaneous and uniform construction given to them (the statutes) by the executive officers charged with the duty of putting them in force.

Similarly, in *Edwards* v. *Darby* (12 Wheat., 206) (p. 209) the court held:

> In the consideration of a doubtful and ambiguous law the contemporaneous construction of those who were called on to act under the law and were appointed to carry those provisions into effect is entitled to very great respect.

See also *Brown* v. *United States* (113 U. S., 568) (pp. 570, 571):

> A contemporaneous construction by the officers upon whom was imposed the duty of executing those statutes is entitled to great respect.

Of course, the construction in the present case, while it was contemporaneous and immediate and by the officers charged in the first instance with putting the act into effect and by officers constantly active in the promotion and drafting of legislation, has not had time to acquire the full weight of authority which a long period would have given it, but this is not a consideration which prevents the court from accepting the aid of the construction. That is shown by the reasoning of the cases above quoted and also by the decision of this court in *Union Insurance Company* v. *Hoge* (21 How., 35), where the court attached weight to the practical construction of the act by the public officers charged with its enforcement, though that practice had existed only two years before the point arose, and in *Smyth* v. *Fiske* (23 Wall., 374), where the construction, as it was contemporaneous and

immediate, was given weight, though it had run only four years before contested.

From the first enforcement of this act, after the preparatory period allowed by the regulations, it has been construed and applied by the officers charged under the law with the duty, to include fraudulent labels of this character.

This construction has been universally acquiesced in until the contest made by the present defendant, who was indicted on November 3, 1909, as is shown by the following judgments, which are identified by the "Notice of Judgment" numbers published by the Department of Agriculture:

> No. 16. Sartoin Skin Food, falsely represented, among other things, to be "remarkably effective in the treatment of pimples, blackheads, rash, blemishes and sunburn, and chapped skin." Investigation begun November 22, 1907. Indictment found July 11, 1908. Plea of guilty.
>
> No. 25. Harper's Cuforhedake Brane-Fude, falsely represented, among other things, to be a special food for the brain. Investigation begun August 27, 1907. Criminal information filed January 14, 1908. Plea of not guilty. Trial (District of Columbia) before Judge Kimball, and the defendant convicted.
>
> No. 29. Hancock's Liquid Sulphur, falsely represented, among other things, to be "Nature's Greatest Germicide, The great cure for Diptheria." Investigation begun November 22, 1907. Plea of guilty.

No. 54. Muco-Solvent, falsely represented, among other things, that "Muco-Solvent cures croup, whooping cough, diphtheria, all throat troubles and catarrhal disorders." Investigation begun October, 1908. Seizure made and libel filed; no defense made; goods condemned.

No. 82. Mme. Yale's Fertilizer Tablets, etc., falsely represented, among other things, to be "A cure for every ill to which woman is sexually heir, from infancy to old age, etc." Investigation begun June 30, 1908. Goods seized and libeled and forfeited, no defense being made.

No. 134. Buchu Gin, falsely represented, among other things, to be "Without an equal for kidney and bladder troubles." Investigation begun March 24, 1909. Decree declaring them to be misbranded but granting their return to the claimant upon bond to conform.

No. 112. Quinine-Whisky, falsely represented, among other things, to be "The greatest preventative and remedy for all malarial complaints ever offered; prevents and cures a cold; the greatest tonic for convalescents from typhus and typhoid fever; an infallible cure for la grippe." Investigation begun December 16, 1908. Goods seized; libel filed; answer admitting the misbranding. Goods decreed to be misbranded and forfeited, but redelivered on furnishing bond to conform.

No. 144. Dr. Fahrney's Teething Syrup, falsely represented, among other things, to be "A sure remedy for all ailments incident to babes from one day old to two or three years.

Especially such troubles as wind colic, griping in bowels, diarrhea, difficult teething, disordered stomach, nervous peevishness, restlessness, lack of sleep, and general liver and kidney troubles." Investigation begun May 25, 1909. Criminal prosecution. Plea of guilty.

No. 180. Gowan's Pneumonia Cure, falsely represented, among other things, that it "Supplies an easily absorbed food for the lungs that quickly effects a permanent cure." Investigation begun November 22, 1907. Criminal information. Plea of guilty.

No. 181. "Eyelin," falsely represented, among other things, that it "Repairs and Rejuvenates the Eye and Sight." Investigation begun February 13, 1908. Plea of guilty.

No. 182. "Bromo Febrin," falsely represented, among other things, to be a "Sure Cure for Headache and Neuralgia." Investigation begun February 1, 1909. Plea of guilty.

No. 201. "Make-Man Tablets," falsely represented, among other things, to be "A brain, blood, and nerve food; especially prepared for the treatment of dyspepsia, neuralgia, kidney and liver trouble, catarrh, consumption, locomotor ataxia, wasting diseases, nervous debility, female disorders, and all kindred diseases resulting from worn-out nervous system, sold under an absolute guaranty to restore lost vitality." Investigation begun June 8, 1909. Goods seized; claimant filed a plea of nolo contendere to the allegations. Judgment of condemnation. Released on bond to conform.

No. 294. "Make-Man Tablets"—an earlier offense, on same facts as No. 201 above. Investigation begun March 6, 1909. Defendant entered pleas of nolo contendere.

No. 203. "Mother's Friend," falsely represented, among other things, that "This is one of the greatest comforts to those expecting to become confined. It is a remedy upon which confidence can be placed, one that will assist in the safe and quick delivery, and that shortens the duration of labor. Such is Mother's Friend. Try it. It is a blessing to suffering women." Investigation begun June 7, 1909; claimants admitting the allegations of the libel. Released on bond.

No. 366. "Mother's Friend." Same as No. 203 above.

No. 205. "Radam's Microbe Killer," falsely represented, among other things, to be "A positive and certain cure for all diseases and is guaranteed to be perfectly harmless. It will effect a cure in every instance if given a fair trial. Cures by removing the cause—microbes; microbe killer is perfectly harmless and can be taken in any quantity without danger. Radam's Microbe Killer is the only known principle that will destroy the microbes in the blood without injury to the system. * * * By removing the one cause it cures disease." Investigation begun June 4, 1909. Judgment of condemnation; no opposition.

No. 233. "Aceton," falsely represented, among other things, to be "A sure relief for all kinds of headache and neuralgia; will break up a cold and prevent pneumonia."

Investigation begun March 5, 1909. Plea of guilty.

No. 258. Preston's Hed-Ake, falsely represented, among other things, that "It cures while you wait. Will prevent headache." A remedy for any kind of headache. Investigation begun April 14, 1909. Plea of guilty.

No. 261. "Sure Thing Tonic," falsely represented, among other things, to be "Sure Thing Tonic. The Wonder Stimulant. Restores Nerve Energy. Renews Vital Force." Investigation begun June 3, 1909. Pleaded guilty.

No. 329. "Dr. Kohler's Antidote," falsely represented, among other things, that it "cures headache." Investigation begun on or about April 15, 1909. Plea of guilty.

No. 345. Extract of Damiana, falsely represented, among other things, to be "Useful as an aphrodisiac and for the restoration of virility in debility of the reproductive organs of both sexes." Investigation begun April 9, 1908. Defendant entered a plea of nolo contendere.

No. 346. Headache Cure, falsely represented, among other things, to be "Kinne's Sure Headache Cure for Sick, Periodical and Nervous Headache." Investigation begun April 14, 1909. Defendant entered a plea of nolo contendere.

No. 392. "Telephone Headache Tablets," falsely represented, among other things, to be "one of the greatest discoveries that medical science has achieved, and never before has mankind been so blessed with such a mar-

velous remedy for the relief of pain in any part of the body—as sick and nervous headache, neuralgia, toothache, la grippe, rheumatism, sciatica—also very efficacious in quieting nervous irritations, sleeplessness, feverishness, cold, etc." Investigation begun January 27, 1909. Defendant entered a plea of guilty.

No. 424. "Tuckahoe Lithia Water," falsely represented, among other things, to be "a sure solvent for calculi, either of the kidneys or liver, especially indicated in all diseases due to uric diathesis, such as gout, rheumatism, gravel stone, incipient diabetes, Bright's Disease, inflamed bladder, eczema, stomach, nervous, and malarial disorders." Investigation begun July 9, 1908. Plea of guilty.

No. 427. "Cancerine," falsely represented, among other things, to be "A remarkably curative extract which if faithfully adhered to will entirely eradicate cancerous poison from the system. A specific cure for cancer in all its forms." Investigation begun about April 12, 1909. Criminal information. Plea of guilty.

No. 428. Headache Powders, falsely represented, among other things, to be "the most certain cure for headaches, neuralgia, la grippe, and for the immediate relief of all pain." Investigation begun about November 4, 1909. Plea of guilty.

No. 433. "Epp-O-Tone," falsely represented, among other things, to be "a skin food for beautifying the complexion." Investigation begun about February 17, 1908. Criminal information. Plea of nolo contendere.

No. 434. "Eau Sublime Hair Coloring," falsely represented, among other things, to be "beneficial, removing dandruff and prevents the hair from falling out." Investigation begun about August 28, 1909. Plea of guilty.

Even since this construction of the statute was contested by the present defendant, the defendant in a case very recently disposed of has pleaded guilty to a charge of misbranding within the meaning of the act founded on precisely the same sort of statements as are attacked here, namely, statements that "Munyon's Asthma Cure permanently cures asthma," etc., and the penalties of the statute were imposed. *United States* v. *Munyon's Homœopathic Home Remedy Co.* (U. S. Dist. Ct., E. D. Pennsylvania, Dec. 14, 1910).

SIXTH.

The similar provisions of various State statutes have been construed by the administrative officers as covering false statements as to curative properties.

No contested case has occurred in any State.

Wherever the question has arisen under the similar State laws this section, in most States almost identical with section 8 of the Federal law, has been always construed by the administrative authorities as prohibiting false, fraudulent, or misleading statements as to curative properties. This construction is manifested either by express regulation to that effect, as in the following States:

Georgia.
Kansas.
Colorado.
Texas.

or by the enforcement of the law to that effect without any explicit administrative rule, as in the following States:

California.	Connecticut.
New Hampshire.	Washington.
Kentucky.	South Dakota.
Ohio.	Maine.
New Jersey.	Florida.
Vermont.	

SEVENTH.

Practically the general definition of misbranding would have no application to the second class of drugs unless it applies to the sort of thing here involved.

The enlargement by section 6 of the term "drug" to cover not merely the regular preparations recognized by the profession, but "any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either man or animal," was intended to bring patent medicines within the field of the act.

Section 8 applies the definition of "misbranding" to this class of drugs as well as the other.

Yet if the general clause "false or misleading in any particular" is limited as it was limited by the court below, it can practically have no application to this class, for all other possible misbrandings are elsewhere covered.

Misstatements as to the State, Territory, or country in which the drug is manufactured or produced are expressly covered by the succeeding specific clause.

Misrepresentations as to the identity of the ingredients or constituents of the article would not occur, because the very point of a patent medicine is the secrecy of its formula.

Nor would misrepresentations as to the weight or quantity of the patent medicine occur, for those things are not commercially sold on such standards, but rather by the bottle.

Nor would misrepresentations concerning the standard of strength or purity be covered by this language, because they are covered by the specific adulteration provisions of section 7.

Nor could the definition have been addressed to the concealment of injurious or deleterious contents, because that is covered by the express "also" clauses of the definition in section 8.

Nor could it have been addressed to a misrepresentation tending to induce a purchaser to believe that he was buying another patent medicine than the one actually before him, because that also is covered by the express "also" clauses of the definitions under section 8.

The cure-all evil is the one great misbranding evil of the patent-medicine trade. In using the unlimited general language which it did use Congress can not have intended to exclude this evil, thereby practically leaving the misbranding provisions without application to this great branch of the subject of the act.

The argument on page 15 and the following pages of the brief of the defendant in error regarding the

particulars in which an article of drug may be misbranded wholly fails to take account of the word "also" in the second paragraph of section 8, which reads as follows: "That for the purposes of this act an article shall *also* be deemed to be misbranded," etc.

EIGHTH.

Nor are these affirmative indications of the intent of Congress to be overruled on the theory advanced in the argument below that such statements of curative properties of patent medicines are matters of scientific opinion and that Congress has no power to control them.

It was contended in argument below that the statute, if construed as claimed by the Government, would be

> absolutely void, because Congress could not go into the practice of medicine or undertake to supervise or direct physicians what opinions they should entertain as to medical science or discovery, or delegate to any department the right to tell physicians what opinions they must entertain as to the curative properties of drugs.

But Congress does not here undertake to dictate what opinions any person shall *entertain* nor does it undertake to make criminal the mere *holding* of any opinions. No such power is asserted or necessary to the validity of the statute actually involved.

The question is a very different one, namely, whether the power exists to protect the public from the injuries resulting from false and misleading *statements*—that is to say, from the *using* to the injury

of mankind of erroneous opinions. This distinction is illustrated by this particular law, especially in the fact that the liability does not depend at all upon the question whether the proponent of the patent medicine himself happens to be so eccentric as to believe, against the established scientific facts, in the efficacy of his concoction. The object aimed at is not his state of mind, but solely the effect of his action on the welfare of the public. As the bill passed the Senate it contained the word "knowingly." (Cong. Rec., vol. 40, pt. 1, p. 897.) But that word was eliminated by the House amendment (H. R. Rep., 2118, 59th Cong., 1st sess.), and without the word the bill became a law.

Postponing for a moment the consideration of the question whether this statute practically concerns or affects real scientific differences of opinion, we will discuss the question whether any immunity exists in favor of matters on which difference of opinion might exist.

A.

Our jurisprudence does not place matters beyond legal control merely because their correct solution may depend upon opinion.

As a general principle it is not possible for any civilization to halt its efforts to protect its people merely because, theoretically, there may arise questions of opinion. A nation must stake something on the state of its science. The position taken in argument is as if it should be urged that the state could not prohibit a man from shooting leaden bullets into

another man because he happens to hold the mad opinion that a leaden bullet will not enter the human body.

There are a multitude of ways in which our Governments, National or State, have rested legal action upon the accepted conclusion of the science of the age concerning a matter theoretically of opinion.

In this very act there are numerous express instances of this. Indeed, the principal subject of the act hangs upon opinion. Adulteration of foods and drugs and determination whether they are "deleterious" are questions which depend upon the opinions of experts.

In section 7 of the act it is provided that "an article of confectionery shall be deemed adulterated for the purposes of the act if it shall contain any ingredient *deleterious or detrimental to health.*" In the same section it is provided that "an article of food shall be deemed to be adulterated," among other cases, "if it contain any added *deleterious* ingredient which may render such article *injurious to health.*"

In section 8 it is provided that in certain specific cases an article of food which does *not* contain any added *poisonous* or *deleterious* ingredients shall not be deemed adulterated or misbranded.

In the same section "*harmless* coloring or flavoring ingredients" are excepted and "*unwholesome* added ingredients" are referred to.

Section 11 provides for the exclusion from the United States of articles sought to be imported which are "*dangerous to the health of the people.*"

The act of March 2, 1897 (ch. 358, 29 St. L., 604), which prohibited the importation of tea, inferior in purity, quality, and fitness for consumption, to the standards provided in section 3 of the act, was before this court in the case of *Buttfield* v. *Stranahan* (192 U. S., 470), and the constitutionality of the act was upheld, though in argument it was urged that—

> The act confers upon the Secretary and the board the uncontrolled power to fix standards of purity, quality, and fitness for consumption, and thus to prescribe arbitarily what teas may be imported and dealt in (p. 478). * * *

The Chief Justice, then Mr. Justice White, dismissed this suggestion as follows:

> We entertain no doubt that it was competent for Congress, by statute, under the power to regulate foreign commerce, to establish standards and provide that no right should exist to import teas from foreign countries into the United States unless such teas should be equal to the standards (483).

Very large and important branches of the law are similarly founded upon this legislative acceptance of the existing condition of science.

An interesting provision of the laws of Iowa (ch. 189, 32d General Assembly, sec. 2), prohibits false statements as to the *medicinal value* of drugs, etc., used for animals.

By the act of July 1, 1902 (ch. 1378, 32 Stat. L., 728), Congress prohibited the sale in the District of Columbia, or the transportation in interstate or foreign commerce, of "any virus, therapeutic serum, anti-

toxin or analogous product applicable to the prevention and cure of diseases of man, unless such virus, serum, toxin, antitoxin, or product has been propagated and prepared in an establishment holding an unsuspended and unrevoked license issued by the Secretary of the Treasury as hereinafter authorized. * * *"

The annual appropriation acts for the Department of Agriculture have carried ever since 1906 the following clause (act June 30, 1906, 34 Stat. L., 674; act Mar. 4, 1907, 34 Stat. L., 1260; act May 23, 1908, 35 Stat. L., 254; act Mar. 4, 1909, 35, Stat. L., 1043; act May 26, 1910, 36 Stat. L., 419):

> General Expenses, Bureau of Animal Industry: * * * To enable the Secretary of Agriculture * * * to purchase in the open market samples of all tuberculin serums, antitoxins, or analogous products of foreign or domestic manufacture, which are sold in the United States, for the detection, prevention, treatment, or cure of diseases of domestic animals, to test the same and to disseminate the results of said tests in such manner as he may deem best.

The act of August 30, 1890 (ch. 839, 26 Stat. L., 414), prohibits the importation of "adulterated or *unwholesome* food or drugs or liquors, adulterated or mixed with any poisonous or noxious medicinal drug or other ingredient *injurious to health*," and provides punishment of the person who shall knowingly import such an article. This statute was referred to by this court in *Crossman* v. *Lurman* (192 U. S., 189),

in which the court upheld the constitutionality of a similar statute of the State of New York as a valid exercise of police power.

As early as the act of August 3, 1888 (ch. 376, 22 Stat. L., 214), Congress provided that no "lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge" should be permitted to immigrate into the United States; and in the act of March 3, 1891 (ch. 551, 26 Stat. L., 1084), Congress specifically added to the excluded group "persons suffering from a loathsome or a dangerous contagious disease," and provided an elaborate system of medical inspection to ascertain whether such diseases existed.

The body of laws concerning the licensing of physicians and prohibiting persons not possessing certain scientific qualifications from acting as physicians are exactly in point. An interesting illustration of this group of laws is found in the case of *State* v. *State Board of Examiners* (32 Minn., 324), where a man undertook to compel the board to issue to him a physician's certificate. The answer was that he had advertised his own certain specific remedies, one of which he claimed would cure cholera morbus when taken internally, and rheumatism when applied externally. The mandamus was refused on the ground that these claims were untrue and impossible. See also *People* v. *McCoy* (125 Ill., 289); *Dent* v. *West Virginia* (129 U. S., 114).

The law of malpractice holds a physician to that degree of skill and learning which is possessed by the average member of his profession.

Pike v. *Housinger*, 155 N. Y., 201.
Logan v. *Field*, 75 Mo. App., 594.
Jackson v. *Burnham*, 20 Colo., 532.
Patten v. *Wiggin*, 51 Me., 594.
Nelson v. *Harrington*, 72 Wis., 591.

The laws for the determination of insanity and the segregation of the insane, and in general all health and quarantine laws, stand entirely upon matters of scientific opinion.

The great number of cases of all kinds in which the facts necessarily turned upon expert opinion are other illustrations of this principle.

In the realm of fraud and fraudulent misrepresentations, and in the subject of deceit as a legal doctrine there have appeared here and there decisions intimating that a representation of a matter of mental intention or opinion does not fall within the law on those subjects. These suggestions have been rebutted by an overwhelming weight of authority establishing the true principle which was succinctly stated by Lord Justice Bowen, in *Edgington* v. *Fitzmaurice* (29 L. R. Ch. Div., 459):

> The state of a man's mind is as much a fact as the state of his digestion. It is true that it is

very difficult to prove what the state of man's mind at a particular time is, but if it can be ascertained, it is such a fact as anything else. A misrepresentation as to the state of a man's mind is therefore a misstatement of fact.

Accordingly, even in this class of cases matters which may theoretically be matters of opinion or state of mind are not exempt from the notice of the law.

Durland v. *U. S.*, 161 U. S., 306.

Butler v. *Watkins*, 13 Wall., 456.

Mo. Drug Co. v. *Wyman*, 129 F. R., 623.

Rogers v. *Va. Car. Chem. Co.*, 149 F. R., p. 1 (C. C. A. 3 C).

Ten Mile Coal & Coke Co. v. *Burt*, 170 F. R., 332.

Kohler Mfg. Co. v. *Beeshore*, 59 F. R., 572 (C. C. A. 3 C).

Fenwick v. *Grimes*, 8 Fed. Cases, 4734; 5 Cranch C. C., 603.

Hedin v. *Minn. Medical Institute*, 62 Minn., 146.

Olston v. *Oreg. Water Power Co.* (*Ore.*), 96 Pac., 1095.

Walters v. *Rock* (*N. Dak.*), 115 N. W., 511.

McDonald v. *Smith*, 139 Mich., 211.

Nowlin v. *Snow*, 40 Mich., 699.

Totten v. *Burhans*, 91 Mich., 495.

Stoney Creek Woolen Co. v. *Smalley*, 111 Mich., 321.

Johnson v. *Monell* (*N. Y.*), 2 Keyes, 655.

Stewart v. *Emerson*, 52 N. H., 301.

Bugham v. *Bank*, 159 Pa., 94.

Ayres v. *French*, 41 Conn., 142.

Down v. *Tucker*, 41 Conn., 197.

Laing v. *McKee*, 13 Mich., 124.
Sweet v. *Kimball*, 166 Mass., 333.
Adams v. *Gillig*, 139 Ap. Div. N. Y., 494.
Smith v. *Smith* (*Ala.*), 45 Southern, 168.
Brady v. *Elliott*, 146 N. C., 578.
Carr v. *Craig* (*Iowa*), 116 N. W., 720.
City Deposit Bank v. *Green* (*Iowa*), 115 N. W., 893.
Wolfe v. *Burke*, 56 N. Y., 115, p. 122.
Edgington v. *Fitzmaurice*, 29 L. R. Ch. Div., 459, *supra*.

The American School of Magnetic Healing v. *McAnnulty* (187 U. S., 94), which was cited to the court below as authority for the proposition that matters which may be matters of opinion lie outside the field of legal authority, does not support the proposition.

That case was a bill for an injunction against McAnnulty as postmaster to restrain him from denying the use of the mails to the complainant, the American School of Magnetic Healing. The bill alleged that such use was denied on the claim that the complainants were engaged in treating diseases by mental healing; that the Postmaster General had held that this claim to treat diseases by mental healing was a scheme to defraud; but that (the bill averred) there was no fraud, deception, or misrepresentation of any kind practiced by the complainants.

To this bill the defendant demurred and the demurrer was sustained by the court below; but this court reversed the judgment.

The opinion of the court does have much to say about differences of scientific opinion, and some of

the language used might be construed to mean that matters susceptible of such scientific differences of opinion can not fall within the field of fraud; but the real point of the decision was that the statute denounced only actual fraud and not mere erroneous opinions, and that the ascertainment by the Postmaster General of the fact that the claims of power to heal by mental suggestion were erroneous was not a finding of fraud.

The court did not hold that a statement in the form of opinion as to curative properties could not be touched by a statute dealing with fraud where it was actually in fact dishonest and fraudulent. Indeed, it left the case open to possible proof that the representations were really dishonest and fraudulent, by the following reservation at the close of the opinion:

> In overruling the demurrer we do not mean to preclude the defendant from showing on the trial, if he can, that the business of complainant as in fact conducted amounts to a violation of the statutes as herein construed.

To construe the *McAnnulty* case otherwise is to regard it as having overruled the *Durland* case (161 U. S., 306, supra) and as being contrary to the whole line of cases above cited.

The *McAnnulty case* has not been considered by the lower Federal courts to have had the effect contended for by counsel. In *Post* v. *U. S.*, 135 F. R., 4 (C. C. A., 5th C.), it was construed as meaning only that "the mere allegation that the defendant was engaged in the

business of mental healing is not an allegation of a scheme or artifice to defraud." The court applied the distinction between the *McAnnulty* and *Durland* cases. Under the authority of the *McAnnulty* case it held invalid three of the indictments before it because they failed to allege that the defendant "did not intend to administer the advertised treatment for which he was paid"; but under the authority of the *Durland* case it upheld the fourth indictment in which there was, as the court said—

> a distinct charge that the representations made by the defendant as to her ability to cure, etc., were false and were well known to her to be false; that the scheme was fraudulent and fictitious; and that her promised treatment was ineffectual for the cure of any disease, and was a deceit and a fraud at the time of the devising, etc., and was known to the defendant to be a deceit and a fraud; and that her promises were incapable of performance.

See also *Mo. Drug Co.* v. *Wyman*, 129 F. R., 623 (C. C. A. E. D. Mo.), where the *McAnnulty* case was again distinguished on the same line in a case involving representations that certain "vitality pills were a positive cure for all nervous and sexual diseases."

B.

Practically, from the point of view necessary to be taken by a legislature, these statements of cure-all properties of patent medicines are not in any real scientific sense matters of opinion. They are charlatanic and

their falseness is generally demonstrable without real dispute.

Practically, the real scientific controversies, as, for instance, that which has been going on between the homeopathic and allopathic schools of physicians, do not raise any question of labels claiming curative properties, and that fact must have been known to Congress. Real scientists do not ship patent medicines with labels containing claims of curative properties. That is not only contrary to the widely known practice of scientific men, but it is contrary to the established codes of ethics of medical men as appears, for example, from the following articles of the code of *the American Medical Association* (1883):

> Art. I, sec. 3. It is derogatory to the dignity of the profession to resort to public advertisements, or private cards, or handbills, inviting the attention of individuals affected with particular diseases, publicly offering advice and medicine to the poor gratis, or promising radical cures. * * * These are the ordinary practices of empirics, and are highly reprehensible in a regular physician.
>
> Sec. 4. Equally derogatory to professional character is it for a physician to hold a patient for any surgical operation or medicine, or to dispense a secret nostrum, whether it be the composition of exclusive property of himself or others. For if such nostrum be of real efficacy, any concealment regarding it is inconsistent with beneficence and professional liberality, and if mystery alone give it value and impor-

> tance such craft implies either disgraceful ignorance or fraudulent avarice. It is also reprehensible for physicians to give certificates attesting the efficacy of patent or secret medicines, or in any way to promote the use of them.

The idea that the construction urged by the Government here is going to take to juries the decision between the homeopathic school and the allopathic school of physicians is a Frankenstein of the imagination. Incidentally, in passing, it may be observed that the same objection theoretically exists in the whole line of matters of opinion above referred to; and, further, that practically the safety valve of the common sense of juries may well be relied on by legislatures as sufficient security against abuse.

But practically, so far as concerns the class of labels which actually fall within the field of this statute, the statements of curative properties made on patent-medicine bottles are not in any real scientific sense matters of opinion at all.

In the steady advance of science, matters which may possibly at some time have been within the realm of opinion have one by one been transferred by the researches and labors of men of science from that realm into the realm of fact. See *Dent* v. *West Virginia* (129 U. S., 114, 123). Among such matters so transferred from speculation into fact is the answer to the question (if it ever was a question) whether Potomac River water slightly colored and flavored with alcohol will "destroy and remove a cancer." To assert that such things will not cure

cancer is no more to assert a mere opinion than it is in these days to assert that the earth is not flat.

It is true that in some philosophic points of view there are no facts at all in the world and everything is opinion; but legislatures can not conduct the public business on such a basis.

The difference in degree, if not in kind, between the real scientific controversies and claims of patent-medicine labels is as vast as the difference between truth and falsehood. Conceivably there may exist a man who really believes that Radam's Microbe Killer is, as it claimed to be, "a positive and certain cure *for all diseases;*" but, nevertheless, the statement is a plain falsehood as much as anything can be.

This is illustrated by the circumstance that these labels, for instance the labels in the case at bar, do not make their statements as matters of opinion, but make them positively as matters of fact, with the intention that they shall be accepted as matters of fact, and in practice they are usually so accepted. No real scientific man would venture to state as facts any matters which still remain within the field of opinion. The misleading quality and the business value of the labels is their character as statements of fact. If they were made as statements of opinion, they would have no commercial value.

In the debate in the House Mr. Webb stated the common-sense view of this question as follows (vol. 40, Cong. Rec., pt. 10, p. 9073):

> Often these nostrums are extravagantly advertised as great cure-alls, when *in fact* they

are absolutely worthless and pure frauds on the public, and are oftentimes seriously harmful to the taker. There is one widely advertised medicine which is claimed to cure blood poison, Bright's disease, consumption, cancer, dropsy, malaria, rheumatism, weak eyes, etc., in fact, nearly every ill that flesh is heir to, from alpha to omega, in the catalogue of diseases. It has been analyzed and found to contain nothing that its manufacturers claimed for it. It consists of a watery solution of sulphurous and sulphuric acid, colored with some vegetable coloring matter. This medicine can not possibly cure the diseases it claims to cure, and is not only worthless, but dangerous, and several deaths have been produced by its use. It is said to cost about 7½ cents per barrel, and is sold to the public for $1 per bottle.

The credulity of the colored population of America has been appealed to by speciously advertised medicines promising to straighten their hair and whiten their faces, and the poor negro, who needs his money, has been duped into buying these worthless lotions and salves.

There is another widely advertised medicine, which claims to cure inflammation of the liver, intestines, rectum, bladder, female organs, and also Bright's disease, not to mention catarrh. This medicine contains about 73 per cent water, about 26 per cent alcohol, and about three one-hundredths per cent of nonvolatile matter. About the only medicinal properties in this medicine besides the alcohol are the small proportion of cubebs

and cardamon. Whatever medical virtue this remedy may have lies in the alcohol, which is sometimes a good medicine, but never for constant use, and certainly not for all the ills which this medicine claims to cure.

There is another nostrum which is claimed to be a wonderful bust developer. Pictures are printed as "before and after" using. An analysis of this "wonderful" nostrum showed that it contained 8 per cent alcohol, sweetened with saccharine, colored with caramel, and has in it a very small amount of plant extract. *It is well known that this nostrum is absolutely worthless as a tissue builder or developer,* and although it is claimed to have originated in Mexico any competent chemist can prepare it. * * *

There is a certain medicine advertised to cure rheumatism, and it is claimed that it is composed of very rare and costly ingredients, one of which is worth $40 per ounce. An analysis showed that the remedy was *worthless and the scheme a downright fraud.*

A remedy whose chief ingredient was red pepper has been extensively advertised and sold as a cure for consumption.

Not only do many of these nostrums contain absolutely worthless ingredients, but many of them contain dangerous and seductive narcotics.

NINTH.

The constitutional power of Congress to prohibit use of the instruments of interstate commerce to the injury of the public is no longer open to question.

Reid v. *Colorado*, 187 U. S., 137, 146.
The Lottery Case, 188 U. S., 321.
Buttfield v. *Stranahan*, 192 U. S., 470, 492–3.
Crossman v. *Lurman*, 192 U. S., 189, 199, 200.
St. L. & I. M. Ry. v. *Taylor*, 210 U. S., 281, 287.

Also in support of this proposition may be noticed the decisions which hold that this power does not exist in the States because delegated to the Federal authority.

Bowman v. *Railway Co.*, 125 U. S., 465.
Leisy v. *Hardin*, 135 U. S., 100, 108.
See *Re Rahrer*, 140 U. S., 545.

TENTH.

The statute is remedial, and should not be narrowly construed.

In this respect it is like the interstate-commerce act—a remedial statute with penal incidental features.

New Haven Railroad v. *Interstate Commerce Commn.*, 200 U. S., 361, 391.
See also *Taylor* v. *U. S.*, 3 Howard, 191.

CONCLUSION.

The judgment should be reversed.

December, 1910.

WINFRED T. DENISON,
Assistant Attorney General.

GEORGE P. MCCABE,
LORING C. CHRISTIE,
Special Assistants to the Attorney General.

APPENDIX.

Illustrations of the public agitation contemporary with the progress of the bill through Congress.

[From Collier's Weekly of October 7, 1905.]

THE GREAT AMERICAN FRAUD.

By SAMUEL HOPKINS ADAMS.

SERIES I.—THE NOSTRUM EVIL.

INTRODUCTION.

(This is the introductory article to a series which will contain a full explanation and exposure of patent-medicine methods, and the harm done to the public by this industry, founded mainly on fraud and poison. *Results of the publicity given to these methods can already be seen in the steps recently taken by the National Government, some State governments and a few of the more reputable newspapers. The object of the series is to make the situation so familiar and thoroughly understood that there will be a speedy end to the worst aspects of the evil.*)

Gullible America will spend this year some seventy-five millions of dollars in the purchase of patent medicines. In consideration of this sum it will swallow huge quantities of alcohol, an appalling amount of opiates and narcotics, a wide assortment of varied drugs ranging from powerful and dangerous heart depressants to insidious liver stimulants; and, far in excess of all other ingredients, undiluted fraud. For fraud, exploited by the skillfulest of advertising bunco men, is the basis of the trade. Should the newspapers, the magazines, and the medical journals

refuse their pages to this class of advertisements, the patent-medicine business in five years would be as scandalously historic as the South Sea Bubble, and the nation would be the richer not only in lives and money, but in drunkards and drug fiends saved.

"Don't make the mistake of lumping all proprietary medicines in one indiscriminate denunciation," came warning from all sides when this series was announced. But the honest attempt to separate the sheep from the goats develops a lamentable lack of qualified candidates for the sheepfold. External remedies there may be which are at once honest in their claims and effective for their purposes; they are not to be found among the much-advertised ointments or applications which fill the public prints. Cuticura may be a useful preparation, but in extravagance of advertising it rivals the most clamorous cure-all. Pond's Extract, one would naturally suppose, could afford to restrict itself to decent methods, but in the recent epidemic scare in New York it traded on the public alarm by putting forth "display" advertisements headed, in heavy black type, "Meningitis," a disease in which witch-hazel is about as effective as molasses. This is fairly comparable to Peruna's ghoulish exploitation, for profit, of the yellow-fever scourge in New Orleans, aided by various southern newspapers of standing which published as *news* an "interview" with Dr. Hartman, president of the Peruna Company.

Drugs that Make Victims.

When one comes to the internal remedies, the proprietary medicines proper, they all belong to the tribe of Capricorn, under one of two heads—harmless frauds or deleterious drugs. For instance, the laxatives per-

form what they promise; but taken regularly, as thousands of people take them (and, indeed, as the advertisements urge), they become an increasingly baneful necessity. Acetanilid will undoubtedly relieve headache of certain kinds; but acetanilid, as the basis of headache powders, is prone to remove the cause of the symptoms permanently by putting a complete stop to the heart action. Invariably, when taken steadily, it produces constitutional disturbances of insidious development which result fatally if the drug be not discontinued, and often it enslaves the devotee to its use. Cocain and opium stop pain; but the narcotics are not the safest drugs to put into the hands of the ignorant, particularly when their presence is concealed in the "cough remedies," "soothing sirups," and "catarrhal powders" of which they are the basis. Few outside of the rabid temperance advocates will deny a place in medical practice to alcohol. But alcohol, fed daily and in increasing doses to women and children, makes not for health, but for drunkenness. Far better whisky or gin unequivocally labeled than the alcohol-laden "bitters," "sarsaparillas," and "tonics" which exhilarate fatuous temperance advocates to the point of enthusiastic testimonials.

None of these "cures" really does cure any serious affection, although a majority of their users recover. But a majority, and a very large majority, of the sick recover, anyway. Were it not so—were one illness out of fifty fatal—this earth would soon be depopulated.

As to Testimonials.

The ignorant drug-taker, returning to health from some disease which he has overcome by the natural resistant powers of his body, dips his pen in gratitude

and writes his testimonial. The man who dies in spite of the patent medicine—or perhaps because of it—doesn't bear witness to what it did for him. We see recorded only the favorable results; the unfavorable lie silent. How could it be otherwise when the only avenues of publicity are controlled by the advertisers? So, while many of the printed testimonials are genuine enough, they represent not the average evidence, but the most glowing opinions which the nostrum vender can obtain, and generally they are the expression of a low order of intelligence. Read in this light, they are unconvincing enough. But the innocent public regards them as the type, not the exception. "If that cured Mrs. Smith of Oshgosh it may cure me," says the woman whose symptoms, real or imaginary, are so feelingly described under the picture. Lend ear to expert testimony from a certain prominent cure-all:

> They see my advertising. They read the testimonials. They are convinced. They have faith in Peruna. It gives them a gentle stimulant and so they get well.

There it is in a nutshell; the faith cure. Not the stimulant, but the faith inspired by the advertisement and encouraged by the stimulant does the work—or seems to do it. If the public drugger can convince his patron that she is well, she *is* well—for his purposes. In the case of such diseases as naturally tend to cure themselves, no greater harm is done than the parting of a fool and his money. With rheumatism, sciatica, and that ilk it means added pangs; with consumption, Bright's disease, and other serious disorders perhaps needless death. No onus of homicide is borne by the nostrum seller; probably the patient would have died anyway; there is no proof

that the patent bottle was in any way responsible. Even if there were—and rare cases do occur where the responsibility can be brought home—there is no warning to others, because the newspapers are too considerate of their advertisers to publish such injurious items.

* * * * *

What One Druggist Is Doing.

Largely for trade reasons a few druggists have been fighting the nostrums, but without any considerable effect. Indeed, it is surprising to see that people are so deeply impressed with the advertising claims put forth daily as to be impervious to warnings even from experts. A cut-rate store, the Economical Drug Company of Chicago, started on a campaign and displayed a sign in the window reading:

PLEASE DO NOT ASK US

What is ANY OLD PATENT MEDICINE Worth?

For you embarrass us, as our honest answer must be that

IT IS WORTHLESS

If you mean to ask at what price we sell it, that is an entirely different proposition.
When sick, consult a good physician. It is the only proper course. And you will find it cheaper in the end than self-medication with worthless "patent" nostrums.

This was followed up by the salesmen informing all applicants for the prominent nostrums that they were wasting money. Yet with all this that store was unable to get rid of its patent-medicine trade, and to-day nostrums comprise one-third of its entire business. They comprise about two-thirds of that of the average small store.

Legislation is the most obvious remedy, pending the enlightenment of the general public or the awakening of the journalistic conscience. But legislation proceeds slowly and always against opposition, which may be measured in practical terms as $250,000,000 at stake on the other side. I note in the last report of the Proprietary Association's annual meeting the significant statement that "the heaviest expenses were incurred in legislative work." Most of the legislation must be done by States, and we have seen, in the case of the Hall Catarrh cure contract, how readily this may be controlled.

Two Government agencies, at least, lend themselves to the purposes of the patent-medicine makers. The Patent Office issues to them trade-mark registration (generally speaking, the convenient term "patent medicine" is a misnomer, as very few are patented) without inquiry into the nature of the article thus safeguarded against imitation. The Post Office Department permits them the use of the mails. Except one particular line, the disgraceful "Weak Manhood" remedies, where excellent work has been done in throwing them out of the mails for fraud, the department has done nothing in the matter of patent remedies, and has no present intention of doing anything; yet I believe that such action, powerful as would be the opposition developed, would be upheld by the courts on the same grounds that sustained the Post Office's position in the recent case of "Robusto."

A Post Office Report.

That the advertising and circular statements circulated through the mails were materially and substantially false, with the result of cheating and defrauding those into whose hands the statements came;

That, while the remedies did possess medicinal properties, these were not such as to carry out the cures promised;

That the advertiser knew he was deceiving;

That in the sale and distribution of his medicines the complainant made no inquiry into the specific character of the disease in any individual case, but supplied the same remedies and prescribed the same mode of treatment to all alike.

* * * * *

It is impossible, even in a series of articles, to attempt more than an exemplary treatment of the patent-medicine frauds. The most degraded and degrading, the "lost vitality" and "blood disease" cures, reeking of terrorization and blackmail, can not from their very nature be treated of in a lay journal. Many dangerous and health-destroying compounds will escape through sheer inconspicuousness. I can touch on only a few of those which may be regarded as typical: The alcohol stimulators, as represented by Peruna, Paine's Celery Compound, and Duffy's Pure Malt Whisky (advertised as an exclusively medical preparation); the catarrh powders, which breed cocaine slaves, and the opium-containing soothing sirups, which stunt or kill helpless infants; the consumption cures, perhaps the most devilish of all, in that they destroy hope where hope is struggling against bitter odds for existence; the headache powders, which enslave so insidiously that the victim is ignorant of his own fate; the comparatively harmless

fake as typified by that marvelous product of advertising effrontery, Liquozone; and, finally, the system of exploitation and testimonials on which the whole vast system of bunco rests, as on a flimsy but cunningly constructed foundation.

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From Collier's Weekly, November 18, 1905.

[From the same series of articles by Samuel Hopkins Adams.]

III.—LIQUOZONE.

Twenty years ago the microbe was making a great stir in the land. The public mind, ever prone to exaggerate the importance and extent of any new scientific discovery, ascribed all known diseases to microbes. The infinitesimal creature with the mysterious and unpleasant attributes became the leading topic of the time. Shrewdly appreciating this golden opportunity, a quack genius named Radam invented a drug to slay the new enemy of mankind and gave it his name. Radam's Microbe Killer filled the public prints with blazonry of its lethal virtues. As it consisted of a mixture of muriatic and sulphuric acids, with red wine, any microbe which took it was like to fare hard; but the ingenious Mr. Radam's method of administering it to its intended prey via the human stomach failed to commend itself to science, though enormously successful in a financial sense through flamboyant advertising.

Liquozone "Cures" Thirty-seven Varieties.

In time some predaceous bacillus, having eluded the "killer," carried off its inventor. His nostrum soon languished. To-day it is little heard of, but from the ashes of its glories has risen a mightier successor, Liquozone. Where twenty years ago the

microbe reveled in publicity, to-day we talk of germs and bacteria; consequently Liquozone exploits itself as a germicide and bactericide. It dispenses with the red wine of the Radam concoction and relies on a weak solution of sulphuric and sulphurous acids, with an occasional trace of hydrochloric or hydrobromic acid. Mostly it is water, and this is what it "cures:"

"Asthma,
Abscess—Anemia,
Bronchitis,
Blood poison,
Bowel troubles,
Coughs—Colds,
Consumption,
Contagious diseases,
Cancer—Catarrh,
Dysentery—Diarrhea,
Dyspepsia—Dandruff,
Eczema—Erysipelas,
Fevers,
Gallstones,
Goiter—Gout,
Hay fever—Influenza,
La grippe,
Leucorrhea,
Malaria—Neuralgia,
Piles—Quinsy,
Rheumatism,
Scrofula,
Skin diseases,
Tuberculosis,
Tumors—Ulcers,
Throat troubles
—all diseases that begin with fever—all inflammations—all catarrh—all contagious diseases—all the results of impure or poisoned blood. In nervous diseases Liquozone acts as a vitalizer, accomplishing what no drugs can do."

These diseases it conquers by destroying, in the human body, the germs which cause (or are alleged to cause) them. Such is Liquozone's claim.

Yet the Liquozone Company is not a patent medicine concern. We have their word for it:

"We wish to state at the start that we are not patent medicine men, and their methods will not be employed by us. * * * Liquozone is too important a product for quackery."

The head and center of this nonpatent medicine cure-all is Douglas Smith. Mr. Smith is by profession a promoter. He is credited with a keen vision for profits. Several years ago he ran on a worthy ex-piano dealer, a Canadian by the name of Powley (we shall meet him again, trailing clouds of glory in a

splendid metamorphosis), who was selling with some success a mixture known as Powley's Liquefied Ozone. This was guaranteed to kill any disease germ known to science. Mr. Smith examined into the possibilities of the product, bought out Powley, moved the business to Chicago, and organized it as the Liquid Ozone Company. Liquid air was then much in the public prints. Mr. Smith, with the intuition of genius, and something more than genius' contempt for limitations, proceeded to catch the public eye with this frank assertion: "Liquozone is liquid oxygen—that is all."

It is enough. That is, it would be enough if it were but true. Liquid oxygen doesn't exist above a temperature of 229 degrees below zero. One spoonful would freeze a man's tongue, teeth, and throat to equal solidity before he ever had time to swallow. If he could, by any miracle, manage to get it down, the undertaker would have to put him on the stove to thaw him out sufficiently for a respectable burial. Unquestionably Liquozone, if it were liquid oxygen, would kill germs, but that wouldn't do the owner of the germs much good, because he'd be dead before they had time to realize that the temperature was falling. That it would cost a good many dollars an ounce to make is, perhaps, beside the question. The object of the company was not to make money, but to succor the sick and suffering. They say so themselves in their advertising. For some reason, however, the business did not prosper as its new owner had expected. A wider appeal to the sick and suffering was needed. Claude C. Hopkins, formerly advertising manager for Dr. Shoop's Restorative (also a cure-all) and perhaps the ablest exponent of his specialty in the country, was brought into the con-

cern and a record-breaking campaign was planned. This cost no little money, but the event proved it a good investment. President Smith's next move showed him to be the master of a silver tongue, for he persuaded the members of a very prominent law firm who were acting as the company's attorneys to take stock in the concern, and two of them to become directors. These gentlemen represent, in Chicago, something more than the high professional standing of their firm; they are prominent socially and forward in civic activities; in short, just the sort of people needed by President Smith to bulwark his dubious enterprise with assured respectability.

The Men Who Back the Fake.

In the Equitable scandal there has been plenty of evidence to show that directors often lend their names to enterprises of which they know practically nothing. This seems to have been the case with the lawyers. One point they brought up, Was Liquozone harmful? Positively not, Douglas Smith assured them. On the contrary, it was the greatest boon to the sick in the world's history, and he produced an impressive bulk of testimonials. This apparently satisfied them; they did not investigate the testimonials, but accepted them at their face value. They did not look into the advertising methods of the company; as nearly as I can find out, they never saw an advertisement of Liquozone in the papers until long afterwards. They just became stockholders and directors, that is all. They did as hundreds of other upright and well-meaning men had done in lending themselves to a business of which they knew practically nothing.

While the lawyers continued to practice law, Messrs. Smith and Hopkins were running the Liquozone Company. An enormous advertising campaign

was begun. Pamphlets were issued containing testimonials and claiming the soundest professional backing. Indeed, this matter of expert testimony, chemical, medical, and bacteriologic, is a specialty of Liquozone. Today, despite its reforms, it is supported by an ingenious system of pseudo-scientific charlatanry. In justice to Mr. Hopkins it is but fair to say that he is not responsible for the basic fraud; that the general scheme was devised and most of the bogus or distorted medical letters arranged before his advent. But when I came to investigate the product a few months ago I found that the principal defense against attacks consisted of scientific statements that would not bear analysis and medical letters not worth the paper they were written on. In the first place the Liquozone people have letters from chemists asseverating that the compound is chemically scientific.

Faked and Garbled Indorsements.

Messrs. Dickman, Mackenzie & Potter, of Chicago, furnish a statement to the effect that the product is "made up on scientific principles, contains no substance deleterious to health, and is an antiseptic and germicide of the highest order." As chemists the Dickman firm stands high, but if sulphuric

ANALYSIS OF LIQUOZONE.

SULPHURIC ACID - About nine-tenths of one per cent.
SULPHUROUS ACID - About three-tenths of one per cent.
WATER - - - - - - - Nearly ninety-nine per cent.

Sulphuric acid is oil of vitriol. Sulphurous acid is also a corrosive poison. Liquozone is the combination of these two heavily diluted.

and sulphurous acids are not deleterious to their health there must be something peculiar about them as human beings. Mr. Deavitt, of Chicago, makes affidavit that the preparation is not made by compounding drugs. A St. Louis bacteriologist testifies that it will kill germs (in culture tubes), and that it has apparently brought favorable results in diarrhea, rheumatism, and a finger which a guinea-pig had gnawed. These and other technical indorsements are set forth with great pomp and circumstance, but when analyzed they fail to bear out the claims of Liquozone as a medicine. Any past investigation into the nature of Liquozone has brought a flood of "indorsements" down on the investigator, many of them medical. My inquiries have been largely along medical lines, because the makers of the drug claim the private support of many physicians and medical institutions, and such testimony is the most convincing. "Liquozone has the indorsement of an overwhelming number of medical authorities," says one of the pamphlets.

One of the inclosures sent to me was a letter from a young physician on the staff of the Michael Reese Hospital, Chicago, who was paid $25 to make bacteriologic tests in pure cultures. He reported: "This is to certify that the fluid Liquozone handed to me for bacteriologic examination has shown bacteriologic and germicidal properties." At the same time he informed the Liquozone agent that the mixture would be worthless medicinally. He writes me as follows: "I have never used or indorsed Liquozone; furthermore, its action would be harmful when taken internally. Can report a case of gastric ulcer due probably to its use."

Later in my investigations I came on this certificate again. It was quoted, in a report on Liquozone

made by the head of a prominent Chicago laboratory for a medical journal, and it was designated, "Report made by the Michael Reese Hospital," without comment or investigation. This surprising garbling of the facts may have been due to carelessness, or it may have some connection with the fact that the laboratory investigator was about that time employed to do work for Mr. Douglas Smith, Liquozone's president.

Another document is an enthusiastic "puff" of Liquozone, quoted as being contributed by Dr. W. H. Myers in The New York Journal of Health. There is not nor ever has been any such magazine as The New York Journal of Health. Dr. W. H. Myers, or some person masquerading under that name, got out a bogus "dummy" (for publication only, and not as guarantee of good faith), at a small charge to the Liquozone people.

For convenience, I list several letters quoted or sent to me, with the result of investigations.

The Suffolk Hospital and Dispensary of Boston, through its president, Albert C. Smith, writes: "Our test shows it (Liquozone) to possess great remedial value." The letter I have found to be genuine But the hospital medical authorities say they know nothing of Liquozone and never prescribe it. If President Smith is prescribing it, he is liable to arrest, as he is not an M. D.

A favoring letter from "Dr." Fred W. Porter, of Tampa, Fla., is quoted. The Liquozone recipients of the letter forgot to mention that "Dr." Porter is not an M. D., but a veterinary surgeon, as is shown by his letterhead.

Dr. George E. Bliss of Maple Rapids, Mich., has used Liquozone for cancer patients. Dr. Bliss writes

me, under the flaming headline of his "cancer cure," that his letter is genuine, and "not solicittated."

Dr. A. A. Bell, of Madison, Ga., is quoted as saying: "I found Liquozone to invigorate digestion." He is *not* quoted (although he wrote it) as saying that his own personal experience with it had shown it to be ineffective. I have seen the original letter, and the unfavorable part of it was blue-penciled.

For a local indorsement of any medicine, perhaps as strong a name as could be secured in Chicago is that of Dr. Frank Billings. In the offices of Collier's and elsewhere Dr. Billings has been cited by the Liquozone people as one of those medical men who were prevented only by ethical considerations from publicly indorsing their nostrum, but who, nevertheless, privately avowed confidence in it. Here is what Dr. Billings has to say of this:

> CHICAGO, ILL., *July 31, 1905.*
> To the EDITOR OF COLLIER'S WEEKLY.
>
> DEAR SIR: I have never recommended Liquozone in any way to any one, nor have I expressed to any representative of the Liquozone Company, or to any other person, an opinion favorable to Liquozone.
>
> (Signed) FRANK BILLINGS, *M. D.*

Under the heading, "Some Chicago Institutions which Constantly Employ Liquozone," are cited Hull House, the Chicago Orphan Asylum, the Home for Incurables, the Evanston Hospital, and the Old People's Home.

Letters to the institutions elicited the information that Hull House had never used the nostrum, and had protested against the statement; that the Orphan Asylum had experimented with it only for external applications, and with such dubious results that it

was soon dropped; that it had been shut out of the Home for Incurables; that a few private patients in the Old People's Home had purchased it, but on no recommendation from the physicians; and that the Evanston Hospital knew nothing of Liquozone and had never used it.

Having a professional interest in the "overwhelming number of medical indorsements" claimed by Liquozone, a Chicago physician, Dr. W. H. Felton, went to the company's offices and asked to see the medical evidence. None was forthcoming; the lists, he was informed, were in the press and could not be shown. He then asked for the official book for physicians advertised by the firm, containing "a great deal of evidence from authorities whom all physicians respect." This also, they said, was "in the press." As a matter of fact, it has never come out of the press and never will; the special book project has been dropped.

One more claim and I am done with the "scientific evidence." In a pamphlet issued by the company and since withdrawn, occurs this sprightly sketch:

> Liquozone is the discovery of Prof. Pauli, the great German chemist, who worked for twenty years to learn how to liquefy oxygen. When Pauli first mentioned his purpose men laughed at him. The idea of liquefying gas, of circulating a liquid oxygen in the blood, seemed impossible. But Pauli was one of those men who set their whole hearts on a problem and follow it out either to success or to the grave. So Pauli followed out this problem, though it took twenty years. He clung to it through discouragements which would have led any lesser man to abandon it. He worked on it despite poverty and ridicule, etc.

Liquozone Kills a Great German Scientist.

Alas for romance! The scathing blight of the legal mind descended on this touching story. The lawyer-directors would have none of "Professor Pauli, the great German chemist," and liquozone destroyed him, as it had created him. Not totally destroyed, however, for from those rainbow wrappings, now dissipated, emerges the humble but genuine figure of our old acquaintance, Mr. Powley, the ex-piano man of Toronto. He is the prototype of the Teutonic savant. So much the Liquozone people now admit, with the defense that the change of Powley to Pauli was, at most, a harmless flight of fancy, "so long as we were not attempting to use a name famous in medicine or bacteriology in order to add prestige to the product." A plea which commends itself by its ingeniousness at least.

Gone is "Professor Pauli," and with him much of his kingdom lies. In fact, I believe there is no single definite intentional misstatement in the new Liquozone propaganda. For some months there has been a cessation of all advertising and an overhauling of materials under the censorship of the lawyer-directors, who were suddenly aroused to the real situation by a storm of protest and criticism, and rather late in the day began to "sit up and take notice." The company has recently sent me a copy of the new booklet on which all their future advertising is to be based. The most important of their fundamental misstatements to go by the board is "Liquozone is liquid oxygen." "Liquozone contains no free oxygen," declares the revision frankly. No testimonials are to be printed. The faked and garbled letters are to be dropped from the files. There is no claim of "overwhelming medical indorsement." Nor is the state-

ment anywhere made that liquozone will *cure* any of the diseases in which it is recommended. Yet such is the ingenuity with which the advertising manager has presented his case that the new newspaper exploitation appeals to the same hopes and fears, with the same implied promises as the old. "I'm well because of Liquozone," in huge type, is followed by the list of diseases "where it applies." And the new list is more comprehensive than the old.

All Ills Look Alike to Liquozone.

Just as to Peruna all ills are catarrh, so to Liquozone every disease is a germ disease. Every statement in the new prospectus of cure "has been submitted to competent authorities, and is exactly true and correct," declares the recently issued pamphlet, "Liquozone and Tonic Germicide;" and the pamphlet goes on to ascribe, among other ills, asthma, gout, neuralgia, dyspepsia, goiter, and "most forms of kidney, liver and heart troubles" to germs. I don't know just which of the eminent authorities who have been working for the Liquozone Company fathers this remarkable and epoch-making discovery. It might be Prof. Pauli, or perhaps the sulphuric-acid-proof firm of Dickman & Mackenzie. Whoever it is ought to make the definite facts public, in the interests of humanity as well as their own. Monuments of discarded pill boxes will celebrate the Liquozone savant who has determined that dyspepsia is a germ trouble. The discovery that gout is caused by the bite of a bacillus and not by uric acid is almost as important an addition to the sum of human knowledge as the determination of a definite organism that produces the twinges of neuralgia, while the germ of heart disease will be acclaimed with whoops of welcome from the entire medical profession.

Unfortunately, the writer of the Liquozone pamphlet, and the experts who edited it, got a little mixed on their germs in the matter of malaria. "Liquozone is deadly to vegetable matter, but helpful to animals," declares the pamphlet. * * * "Germs are vegetables"—and that is the reason that Liquozone kills them. But malaria, which Liquozone is supposed to cure, is positively known to be due to animal organisms in the blood, not vegetable. Therefore, if the claims are genuine, Liquozone, being "helpful to animals," will aid and abet the malaria organism in his nefarious work, and the Liquozone Company, as well-intentioned men, working in the interests of health, ought to warn all sufferers of this class from use of their animal stimulator.

The old claim is repeated that nothing enters into the production of Liquozone but gases, water, and a little harmless coloring matter, and that the process requires large apparatus and from eight to fourteen days' time. I have seen the apparatus, consisting of huge wooden vats, and can testify to their impressive size. And I have the assurance of several gentlemen whose word (except in print) I am willing to take, that fourteen days' time is employed in impregnating every output of liquid with gas. The result, so far as can be determined chemically or medicinally, is precisely the same as could be achieved in fourteen seconds by mixing the acids with the water. The product is still sulphurous and sulphuric acid heavily diluted, that is all.

Will the compound destroy germs in the body? This is, after all, the one overwhelmingly important point for determination; for if it will, all the petty fakers and forgery, the liquid oxygen and Prof. Pauli and the mythical medical journalism may be forgiven.

For more than four months now Collier's has been patiently awaiting some proof of the internal germicidal qualities of Liquozone. None has been forthcoming except specious generalities from scientific employees of the company—and testimonials. The value of testimonials as evidence is considered in a later article. Liquozone's are not more convincing than others. Of the chemists and bacteriologists employed by the Liquozone Company there is not one who will risk his professional reputation on the simple and essential statement that Liquozone taken internally kills germs in the human system. One experiment has been made by Mr. Schoen of Chicago, which I am asked to regard as indicating in some degree a deterrent action of Liquozone on the disease of the anthrax. Of two guinea pigs inoculated with anthrax, one which was dosed with Liquozone survived the other, not thus treated, by several hours. Bacteriologists employed by us to make a similar test failed, because of the surprising fact that the dose as prescribed by Mr. Schoen promptly killed the first guinea pig to which it was administered. A series of guinea pig tests was then arranged (the guinea pig is the animal which responds to germ infection most nearly as the human organism responds), at which Dr. Gradwhol, representing the Liquozone Company, was present, and in which he took part. The report follows:

LEDERLE LABORATORIES.

Sanitary, Chemical, and Bacteriologic Investigations.

518 Fifth Avenue,
New York City, October 21, 1905.

Anthrax test.—Twenty-four guinea pigs were inoculated with anthrax bacilli, under the

same conditions, the same amount being given to each. The representative of the Liquozone people selected the twelve pigs for treatment. These animals were given Liquozone in 5 cc. doses for three hours. In twenty-four hours all pigs were dead—the treated and the untreated ones.

Second anthrax test.—Eight guinea pigs were inoculated under the same conditions with a culture of anthrax sent by the Liquozone people. Four of these animals were treated for three hours with Liquozone as in the last experiments. These died also in from thirty-six to forty-eight hours, as did the remaining four.

Diphtheria test.—Six guinea pigs were inoculated with diphtheria bacilli and treated with Liquozone. They all died in from forty-eight to seventy-two hours. Two out of three controls (i. e., untreated guinea pigs) remained alive after receiving the same amount of culture.

Tuberculosis test.—Eight guinea pigs were inoculated with tubercle bacilli. Four of these animals were treated for eight hours with 5 cc. of a 20 per cent solution of Liquozone. Four received no Liquozone. At the end of twenty-four days all the animals were killed.

Fairly developed tuberculosis was present in all.

To summarize, we would say that the Liquozone had absolutely no curative effect, but did, when given in pure form, lower the resistance of the animals, so that they died a little earlier than those not treated.

LEDERLE LABORATORIES.
By ERNEST J. LEDERLE.

Dr. Gradwohl, representing the Liquozone Company, stated that he was satisfied of the fairness of

the tests. He further declared that in his opinion the tests had proved satisfactorily the total ineffectiveness of Liquozone as an internal germicide.

But these experiments show more than that. They show that in so far as Liquozone has any effect, it tends to lower the resistance of the body to an invading disease. That is, in the very germ diseases for which it is advocated, *Liquozone may decrease the chances of the patient's recovery with every dose that is swallowed, but certainly would not increase them.*

In its own field Liquozone is *sui generis.* On the ethical side, however, there are a few "internal germicides," and one of these comes in for mention here, not that it is the least like Liquozone in its composition, but because by its monstrous claims it challenges comparison.

Since the announcement of this article, and before, Collier's has been in receipt of much virtuous indignation from a manufacturer of remedies which, he claims, Liquozone copies. Charles Marchand has been the most active enemy of the Douglas Smith product. He has attacked the makers in print, organized a society, and established a publication mainly devoted to their destruction, and circulated far and wide injurious literature (most of it true) about their product. Of the relative merits of Hydrozone, Glycozone (Marchand's products), and Liquozone, I know nothing; but I know that the Liquozone Company has never in its history put forth so shameful an advertisement as the one produced on page 28, signed by Marchand, and printed in the New Orleans States when the yellow-fever scare was at its height.

And Hydrozone is an "ethical" remedy; its advertisements are to be found in reputable medical journals.

The Same Old Fake.

Partly by reason of Marchand's energy, no nostrum in the country has been so widely attacked as the Chicago product. Occasional deaths, attributed (in some cases unjustly) to its use, have been made the most of, and scores of analyses have been printed, so that in all parts of the country the true nature of the nostrum is beginning to be understood. The prominence of its advertising and the reckless breadth of its claims have made it a shining mark. North Dakota has forbidden its sale. San Francisco has decreed against it; so has Lexington, Ky., and there are signs that it will have a fight for its life soon in other cities. It is this looming danger that impelled Liquozone to an attempted reform last summer. Yet, in spite of the censorship of its legal lights, in spite of the revision of its literature by its scientific experts, in spite of its ingenious avoidance of specifically false claims in the advertising which is being scattered broadcast to-day, Liquozone is now what it was before its rehabilitation, a fraud which owes its continued existence to the laxity of our public-health methods and the cynical tolerance of the national conscience.

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[From Collier's Weekly of Jan. 13, 1906. From the same series of articles, by Samuel Hopkins Adams.]

V.—PREYING ON THE INCURABLES.

Incurable disease is one of the strongholds of the patent-medicine business. The ideal patron, viewed in the light of profitable business, is the victim of some slow and wasting ailment in which recurrent hope inspires to repeated experiments with any

"cure" that offers. In the columns of almost every newspaper you may find promises to cure consumption. Consumption is a disease absolutely incurable by any medicine, although an increasing percentage of consumptives are saved by open air, diet, and methodical living. This is thoroughly and definitely understood by all medical and scientific men. Nevertheless there are in the patent-medicine world a set of harpies who, for their own business interests, deliberately foster in the mind of the unfortunate sufferer from tuberculosis the belief that he can be saved by the use of some absolutely fraudulent nostrum. Many of these consumption cures contain drugs which hasten the progress of the disease, such as chloroform, opium, alcohol, and hasheesh. Others are comparatively harmless in themselves, but by their fervent promises of rescue they delude the sufferer into misplacing his reliance, and forfeiting his only chance by neglecting those rigidly careful habits of life which alone can conquer the "white plague." One and all, the men who advertise medicines to cure consumption deliberately traffic in human life.

* * * * *

Absolutely False Claims.

A curious mixture of the cautious, semiethical method and the blatant claim-all patent medicine is offered in the Ozomulsion Company. Ozomulsion does not, like the "cures" mentioned above, contain active poisons. It is one of the numerous cod-liver oil preparations, and its advertising, in the medical journals at first and now in the lay press, is that of a cure for consumption. I visited the offices of the Ozomulsion Company recently and found them duly

furnished with a regular physician, who was employed, so he informed me, in a purely ethical capacity. There was also present during the interview the president of the Ozomulsion Company, Mr. A. Frank Richardson, former advertising agent, former deviser of the advertising of Swamp-Root, former proprietor of Kranitonic, and present proprietor of Slocum's Consumption Cure, which is the "wicked partner" of Ozomulsion. For convenience, I will put the conversation in court report form, and, indeed, it partook somewhat of the nature of a cross-examination:

Q. Dr. Smith, will Ozomulsion cure consumption?

A. Ozomulsion builds up the tissues, imparts vigor, aids the natural resistance of the body, etc. [Goes into a long exploitation in the manner and style made familiar by patent-medicine pamphlets.]

Q. But will it cure consumption?

A. Well, without saying that it is a specific, etc. [Passes to an instructive, entertaining, and valuable disquisition on the symptoms and nature of tuberculosis.]

Q. Yes; but will Ozomulsion cure consumption?

A. We don't claim that it will cure consumption.

Q. Does not this advertisement state that Ozomulsion will cure consumption? [Showing advertisement.]

A. It seems so.

Q. Will Ozomulsion cure consumption?

A. In the early stages of the disease——

Q. (Interrupting.) Does the advertisement make any qualifications as to the stage of the disease?

A. Not that I find.

Q. Have you ever seen that advertisement before?

A. Not to my knowledge.

Q. Who wrote it?

A. (By President Richardson.) I done that ad. myself.

Q. Mr. Richardson, will Ozomulsion cure consumption?

A. Sure; we got testimonials to prove it.

Q. Have you ever investigated any of these testimonials?

Q. (To Dr. Smith.) Dr. Smith, in view of the direct statement of your advertising, do you believe that Ozomulsion will cure consumption?

A. Well, I believe in a great many cases it will.

Health for Five Dollars.

That is as far as Dr. Smith would go. I wonder what he would have said as to the Dr. T. A. Slocum side of the business. Dr. Slocum puts out a "Special Cure Offer" that will snatch you from the jaws of death, on the blanket plan, for $5, and guarantees the cure (or more medicine) for $10. His scheme is so noble and broad-minded that I can not refrain from detailing it. For $5 you get—

1 large bottle of Psychine,
1 large bottle of Ozomulsion,
1 large bottle of Coltsfoote Expectorant,
1 large tube of Ozojell,
3 boxes of Lazy Liver Pills,
3 Hot X-Ray Porous Plasters,

"which," says the certificate, "will, in a majority of cases, effect a permanent cure of the malady from which the invalid is now suffering." Whatever ails you, that's what Dr. T. A. Slocum cures. For $10 you get almost twice the amount, plus the guarantee. Surely there is little left on earth, unless Dr. Slocum

should issue a $15 offer to include funeral expenses and a tombstone.

The Slocum Consumption Cure proper consists of a gay-hued substance known as "Psychine." Psychine is about 16 per cent alcohol, and has a dash of strychnine to give the patient his money's worth. Its alluring color is derived from cochineal. It is "an infallible and unfailing remedy for consumption." Ozomulsion is also a sure cure if the literature is to be believed. To cure one's self twice of the same disease savors of reckless extravagance, but as "a perfect and permanent cure will be the inevitable consequence," perhaps it's worth the money. It would not do to charge Dr. T. A. Slocum with fraud, because he is, I suppose, as dead as Lydia E. Pinkham; but Mr. A. Frank Richardson is very much alive, and I trust it will be no surprise to him to see here stated that his Ozomulsion makes claims that it can not support; that his Psychine is considerably worse; that his special cure offer is a bit of shameful quackery; and that his whole Slocum Consumption Cure is a fake and a fraud so ludicrous that its continued existence is a brilliant commentary on human credulousness.

Since the early sixties, and perhaps before, there has constantly been in the public prints one or another benefactor of the human race who wishes to bestow on suffering mankind, free of charge, a remedy which has snatched him from the brink of the grave. Such a one is Mr. W. A. Noyes, of Rochester, N. Y. To anyone who writes him he sends gratis a prescription which will surely cure consumption. But take this prescription to your druggist and you will fail to get it filled, for the simple reason that the ingenious Mr. Noyes has employed a pharmaceutical nomenclature peculiarly his own. If you wish to try

the "Cannabis Sativa Remedy" (which is a mixture of hasheesh and other drugs), you must purchase it direct from the advertiser at a price which assures him an abnormal profit. As Mr. Noyes writes me proposing to give special treatment for my (supposed) case, depending on a diagnosis of 67 questions, I fail to see why he is not liable for practicing medicine without a license.

Piso Grows Cautious.

Piso's Consumption Cure, extensively advertised a year or two ago, is apparently withdrawing from the field so far as consumption goes, and the Piso people are now more modestly promising to cure coughs and colds. Old analyses give as the contents of Piso's Cure for Consumption, alcohol, chloroform, opium, and cannabis indica (hasheesh). In reply to an inquiry as to whether their remedy contains morphine and cannabis indica, the Piso Company replies: "Since the year 1872 Piso's Cure has contained no morphine or anything derived from opium." The question as to cannabis indica is not answered. Analysis shows that the "cure" contains chloroform, alcohol, and apparently cannabis indica. It is therefore another of the remedies which can not possibly cure consumption, but, on the contrary, tend by their poisonous and debilitating drugs to undermine the victim's stamina.

Peruna, Liquozone, Duffy's Malt Whiskey, Pierce's Golden Medical Discovery, and the other "blanket" cures include tuberculosis in their lists, claiming great numbers of well-authenticated cures. From the imposing book published by the R. V. Pierce Company, of Buffalo, I took a number of testimonials for investigation; not a large number, for I found the

consumption testimonial rather scarce. From fifteen letters I got results in nine cases. Seven of the letters were returned to me marked "unclaimed," of which one was marked "Name not in the dictory," another "No such postoffice in the State," and a third "Deceased." The eighth man wrote that the Golden Medical Discovery had cured his cough and blood-spitting, adding: "It is the best lung medisan I ever used for lung trubble." The last man said he took twenty-five bottles and was cured! Two out of nine seems to me a suspiciously small percentage of traceable recoveries. Much stress has been laid by the Proprietary Association of America through its press committee on the suit brought by R. V. Pierce against the Ladies' Home Journal, the implication being (although the suit has not yet been tried) that a reckless libeler of a noble and worthy business has been suitably punished. In the full appreciation of Dr. Pierce's attitude in the matter of libel, I wish to state that in so far as its claim of curing consumption is concerned his Golden Medical Discovery is an unqualified fraud.

One might suppose that the quacks would stop short of trying to deceive the medical profession in this matter, yet the "consumption cure" may be found disporting itself in the pages of the medical journals. For instance, I find this advertisement in several professional magazines:

"McArthur's Syrup of Hypophosphites has proved itself, time and time again, to be positively beneficial in this condition (tuberculosis) in the hands of prominent observers, clinicians and, what is more, practicing physicians, hundreds of whom have written their admiring encomiums in its behalf, and it is the enthusiastic conviction of many that *its effect is truly*

specific." Which, translated into lay terms, means that the sirup will cure consumption. I find also in the medical press "a sure cure for dropsy," fortified with a picture worthy of Swamp Root or Lydia Pinkham. Both of these are frauds in attempting to foster the idea that they will *cure* the disease, and they are none the less fraudulent for being advertised to the medical profession instead of to the laity.

Is there, then, no legitimate advertising of preparations useful in diseases such as tuberculosis? Very little, and that little mostly in the medical journals, exploiting products which tend to build up and strengthen the patient. There has recently appeared, however, one advertisement in the lay press which seems to me a legitimate attempt to push a nostrum. It is reproduced at the beginning of this article. Notice, first, the frank statement that there is no specific for consumption; second, that there is no attempt to deceive the public into the belief that the emulsion will be helpful in all cases. Whether or not Scott's Emulsion is superior to other cod-liver oils is beside the present question. If all patent medicine "copy" were written in the same spirit of honesty as this, I should have been able to omit from this series all consideration of fraud, and devote my entire attention to the far less involved and difficult matter of poison. Unhappily, all of the Scott's Emulsion advertising is not up to this standard. In another newspaper I have seen an excerpt in which the Scott & Bowne Company come perilously near making, if they do not actually make, the claim that their emulsion is a cure, and furthermore make themselves ridiculous by challenging comparison with another emulsion, suggesting a chemical test and offering, if their nostrum comes out second best, *to give*

to the institution making the experiment a supply of their oil free for a year. This is like the German druggist who invented a heart cure and offered two cases to anyone who could prove that it was injurious!

Consumption is not the only incurable disease in which there are good pickings for the birds of prey. In a recent issue of the New York Sunday American-Journal I find three cancer cures, one dropsy cure, one "heart-disease soon cured," three epilepsy cures, and a "case of paralysis cured." Cancer yields to but one agency—the knife. Epilepsy is either the result of pressure on the brain or some obscure cerebral disease; medicine can never cure it. Heart disease is of many kinds, and a drug that may be helpful in relieving symptoms in one case might be fatal in another. The same is true of dropsy. Medical science knows no "cure" for paralysis. As space lacks to consider individually the nature of each nostrum separately, I list briefly, for the protection of those who read, a number of the more conspicuous swindles of this kind now being foisted on the public:

Rupert Wells' Radiatized Fluid, for cancer.
Miles's Heart Disease Cure.
Miles's Grand Dropsy Cure.
Dr. Tucker's Epilepsy Cure.
Dr. Grant's Epilepsy Cure.
W. H. May's Epilepsy Cure.
Dr. Kline's Epilepsy Cure.
Dr. W. O. Bye's Cancer Cure.
Mason's Cancer Cure.
Dr. Williams' Pink Pills for Pale People, which are advertised to cure paralysis and are a compound of green vitriol, starch, and sugar.

Purchasers of these nostrums not only waste their money, but in many cases they throw away their only chance by delaying proper treatment until it is too late.

Properly, a "cure" known as Bioplasm belongs in this list, but so ingenious are its methods that it deserves some special attention. In some of the New York papers a brief advertisement reading as follows occupies a conspicuous position:

> After suffering for 10 years the torture that only an ataxic can know, Mr. E. P. Burnham, of Delmar, N. Y., has been relieved of all pain and restored to health and strength and the ability to resume his usual pursuits by an easily obtained and inexpensive treatment, which any druggist can furnish. To any fellow sufferer who mails him a self-addressed envelope Mr. Burnham sends free this prescription which cured him.—Adv.

Now, people who give away something for nothing and spend money advertising for a chance to do it are as rare in the patent-medicine business as out of it, and Delmar, N. Y., is not included in any map of Altruria that I have learned of. E. P. Burnham, therefore, seemed worth writing to. The answer came back promptly, inclosing the prescription and explaining the advertiser's purpose:

> My only motive in the notice which caught your attention is to help other sufferers. *You owe me nothing. I have nothing to sell.* When you are benefited, however, if you feel disposed and able to send me a contribution to assist me in making this great boon to our fellow sufferers better known, it will be thankfully received and used for that purpose.

I fear that Mr. Burnham doesn't make much money out of grateful correspondents who were cured of locomotor ataxia by his prescription, because locomotor ataxia is absolutely and hopelessly incurable. Where Mr. Burnham gets his reward, I fancy, is from the Bioplasm Company, of 100 William Street, New York, whose patent medicine is prescribed for me. I should like to believe that his "only motive is to help other sufferers," but as I find, on investigation, that the advertising agents who handle the "Burnham" account are the Bioplasm Company's agents I am regretfully compelled to believe that Mr. Burnham, instead of being of the tribe of the good Samaritan, is probably an immediate relative of Ananias. The Bioplasm Company also proposes to cure consumption, and is worthy of a conspicuous place in the Fraud's Gallery of Nostrums.

Even the skin of the Ethiop is not exempt from the attention of the quacks. A colored correspondent writes, asking that I "give a paragraph to these frauds who cater to the vanity of those of my race who insult their Creator in attempting to change their color and hair," and inclose a typical advertisement of "Lustorene," which "straightens kinky, nappy, curly hair." and of "Lustorone Face Bleach," which "whitens the darkest skin" and will "bring the skin to any desired shade or color." Nothing could better illustrate to what ridiculous lengths the nostrum fraud will go. Of course, the Lustorone business is fraudulent. Some time since a Virginia concern, which advertised to turn negroes white, was suppressed by the Post Office Department, which might well turn its attention to Lustorone Face Bleach.

There are being exploited in this country to-day more than 100 cures for diseases that are absolutely

beyond the reach of drugs. They are owned by men who know them to be swindles, and who in private conversation will almost always evade the direct statement that their nostrums will "cure" consumption, epilepsy, heart disease and ailments of that nature. Many of them "guarantee" their remedies. They will return your money if you aren't satisfied. And they can afford to. They take the lightest of risks. The real risk is all on the other side. It is their few pennies per bottle against your life. Were the facile patter by which they lure to the bargain a menace to the pocketbook alone, one might regard them only as ordinary followers of light finance, might imagine them filching their gain with the confidential, half-brazen, half-ashamed leer of the thimblerigger. But the matter goes further and deeper. Every man who trades in this market, whether he pockets the profits of the maker, the purveyor or the advertiser, takes toll of blood. He may not deceive himself here, for here the patent medicine is nakedest, most cold-hearted. Relentless greed sets the trap and death is partner in the enterprise.

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[From Collier's Weekly of February 17, 1906.]

[From the same series of articles by Samuel Hopkins Adams.]

VI.—THE FUNDAMENTAL FAKES.

Advertising and testimonials are respectively the aggressive and defensive forces of the Great American Fraud. Without the columns of the newspapers and magazines wherein to exploit themselves, a great majority of the patent medicines would peacefully and blessedly fade out of existence. Nearly all the world of publications is open to the swindler, the exceptions

being the high-class magazines and a very few independent spirited newspapers. The strongholds of the fraud are dailies, great and small, the cheap weeklies, and the religious press. According to the estimate of a prominent advertising firm, above 90 per cent of the earning capacity of the prominent nostrums is represented by their advertising. And all this advertising is based on the well-proven theory of the public's pitiable ignorance and gullibility in the vitally important matter of health.

Study the medicine advertising in your morning paper, and you will find yourself in a veritable goblin-realm of fakery, peopled with monstrous myths. Here is an amulet in the form of an electric belt, warranted to restore youth and vigor to the senile; yonder a magic ring of mysterious inhaler, or a bewitched foot plaster which will draw the pangs of rheumatism from the tortured body "or your money back;" and again some beneficent wizard in St. Louis promises with a secret philter to charm away deadly cancer, while in the next column a firm of magi in Denver proposes confidently to exorcise the demon of incurable consumption without ever seeing the patient. Is it credible that a supposedly civilized nation should accept such stuff as gospel? Yet these exploitations cited above, while they are extreme, differ only in degree from nearly all patient-medicine advertising. Ponce de Leon, groping toward that dim fountain whence youth springs eternal, might believe that he had found his goal in the Peruna factory, the Liquozone "laboratory," or the Vitæ-Ore plant; his thousands of descendants in this century of enlightenment painfully drag themselves along poisoned trails, following a will-o'-the-wisp that dances above the open graves.

Newspaper Accomplices.

If there is no limit to the gullibility of the public on the one hand, there is apparently none to the cupidity of the newspapers on the other. As the Proprietary Association of America is constantly setting forth in veiled warnings, the press takes an enormous profit from patent-medicine advertising. Mr. Hearst's papers alone reap a harvest of more than half a million dollars per annum from this source. The Chicago Tribune, which treats nostrum advertising in a spirit of independence, and sometimes with scant courtesy, still receives more than $80,000 a year in medical patronage. Many of the lesser journals actually live on patent medicines. What wonder that they are considerate of these profitable customers! Pin a newspaper owner down to the issue of fraud in the matter, and he will take refuge in the plea that his advertisers and not himself are responsible for what appears in the advertising columns. *Caveat emptor* is the implied superscription above this department. The more shame to those publications which prostitute their news and editorial departments to their greed. Here are two samples, one from the Cleveland Plain-Dealer, the other from a temperance weekly:

> CURES CATARRH AND ASTHMA.
> FOREIGN SPECIALISTS GIVE REASON FOR MARVELOUS SUCCESS OF NEW REMEDY, ASCATCO.
>
> *Vienna, September 9.*—The astonishing success of the Ascatco treatment for catarrh, asthma, and bronchitis is wholly attributed to its marvelous action on the mucous membranes, and having no disturbing influence on other organs of the body.
>
> It is claimed by European savants, from whom this remedy emanated, that five hundred drops will cure permanently even the

most obstinate cases. The dose is small and pleasant to take, being only seven drops twice daily. The Austrian dispensary, 32 West Twenty-fifth Street, New York, N. Y., will send a trial treatment of Ascatco free by mail to all sufferers who have not tested the wonderful curative powers of the specific.

THE AMERICAN ISSUE, AN ADVOCATE OF CHRISTIAN PATRIOTISM.
OFFICIAL ORGAN OF THE ANTI-SALOON LEAGUE, COLUMBUS, OHIO.

Paul said: "Prove all things; hold fast that which is good." Vitæ-Ore has been before the American people for three decades and is still growing in popularity.

They have proven and hold fast to it. Read about it on last page. You can test and prove it without a penny risk.

Green Goods "Cable News."

The "Ascatco" advertisement, which the Plain-Dealer prints as a cablegram, without any distinguishing mark to designate it as an advertisement, of course, emanates from the office of the nostrum, and is a fraud, as the Plain-Dealer well knew when it accepted payment, and became partner to the swindle by deceiving its readers. The Vitæ-Ore "editorial" appears by virtue of a full-page advertisement of this extraordinary fake in the same issue.

* * * * *

Our national quality of commercial shrewdness fails us when we go into the open market to purchase relief from suffering. The average American, when he sets out to buy a horse, or a house, or a box of cigars, is a model of caution. Show him testimonials from any number of prominent citizens and he would simply scoff. He will, perhaps, take the word of his life-long friend, or of the pastor of his church, but only after

mature thought, fortified by personal investigation. Now observe the same citizen seeking to buy the most precious of all possessions, sound health. Anybody's word is good enough for him here—an admiral whose puerile vanity has betrayed him into a testimonial; an obliging and conscienceless senator; a grateful idiot from some remote hamlet; a renegade doctor or a silly woman who gets a bonus of a dozen photographs for her letter—any of these are sufficient to lure the hopeful patient to the purchase. He wouldn't buy a second-hand bicycle on the affidavit of any of them, but he will give up his dollar and take his chance of poison on a mere newspaper statement which he doesn't even investigate. Every intelligent newspaper publisher knows that the testimonials which he publishes are as deceptive as the advertising claims are false. Yet he salves his conscience with the fallacy that the moral responsibility is on the advertiser and the testimonial giver. So it is, but the newspaper shares it. When an aroused public sentiment shall make our public men ashamed to lend themselves to this charlatanry, and shall enforce on the profession of journalism those standards of decency in the field of medical advertising which apply to other advertisers, the Proprietary Association of America will face a crisis more perilous than any threatened legislation. For printer's ink is the very lifeblood of the noxious trade. Take from the nostrum vendors the means by which they influence the millions, and there will pass to the limbo of pricked bubbles a fraud whose flagrancy and impudence are of minor import compared to the cold-hearted greed with which it grinds out its profits from the sufferings of duped and eternally hopeful ignorance.

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THE LADIES' HOME JOURNAL.

[Extracts from editorial in Ladies' Home Journal for April, 1905. Copyright, 1905, by the Curtis Publishing Company and reprinted by permission from The Ladies' Home Journal.]

Not long ago a man was engaged by a certain "patent-medicine" concern to advertise its concoction. After looking into statistics he made up his mind to one fact: That even if all the people in the country actually suffering from the disease which the medicine was supposed to cure bought the preparation, the receipts would not be enough to pay the advertising bills of the concern, let alone other expenses. So, to use practically his own words, this man decided upon this diabolical plan:

> "I set out in my advertising to create 'hypos,' and if it wasn't for the 'hypos' we couldn't do business. What are 'hypos?' Why hypochondriacs, I mean—people who have melancholia, the blues, feel depressed, you know, but who, in reality, have nothing the matter with them. There are thousands and thousands of them already, but my trick was to make thousands more of 'hypos.' How? Why, by making as many people as possible who really haven't got anything the matter with them think that they are suffering from the diseases which our medicines are said to cure. See?"
>
> "How do you do it?" was asked this man.
>
> "Why, this way, take your own case as an example: Suppose this morning you pick up your newspaper and read an advertisement with the heading, 'Dangerous symptoms,' in big, black type. 'Do you ever have a headache?' the advertisement asks, and it goes on: 'That is Nature's warning of the near approach of nervous exhaustion. Use before it is too late. So much a bottle at all druggists.' Perhaps you happen to have a headache. At any rate,

it is pretty certain that you have had headaches. But even so, the 'ad' doesn't make any impression on you. You throw the paper down and forget all about it.

"Next morning you pick up the paper again. For the second time that big, black headline, 'Dangerous symptoms,' strikes your eye; but this time it says: 'Don't neglect a pain in the back,' and it goes on: 'Look out! Take warning! It means that your nervous system is out of order. You are facing the untold horrors of nervous exhaustion. Take a bottle of ——— before it is everlastingly too late. So much at all druggists.' This time the 'ad' makes a slight impression on you. You begin to wonder whether it is possible that there really is any danger of your coming down with nervous exhaustion. Perhaps within the next day or two you do have a slight pain in the back. It doesn't mean anything, of course. But you remember my advertisement, or you see it again in your paper that morning. Then you may go to the drug store and buy a bottle of our medicine. Morning after morning, and afternoon after afternoon, we keep hammering away along the same line. We enumerate, one after the other, all the little aches and pains which everybody occasionally feels. Each one is, of course, an alarming symptom of nervous exhaustion. Sooner or later this kind of advertising is bound to fetch a large proportion of people, especially women, because they are more imaginative than men, and there you are. That's the principle I work on; that's my job, creating 'hypos.' We've got it all down to a scientific basis."

* * * * *

Not a word has been said so far, you will notice, about any of these people who were to be asked to sign testimonials testifying to the curative properties of the new medicine going so far as to try a bottle of the

remedy before furnishing their letters and photographs. Nor was that subject mentioned, except as a jest.

The "man from upstairs" went to work on the basis that he was to get testimonials from people who had never even seen a bottle of the medicine, to the virtues of which they were to testify publicly. With many of the aldermen and other public officials he was on friendly, even intimate, terms. As a newspaper reporter and writer he was in a position to do them frequent favors. To the first city official he met he said:

> "Now, I want to get you to sign a testimonial for a new medicine for me. What is it? Why, its the newly-discovered cure for everything in the shape of influenza, asthma, and that 'tired feeling.' Will you do it?"
>
> "What do you want to do with it?" asked the city official.
>
> "Well, we want you to sign a letter, giving your experience with this wonderful new remedy, telling about how your strenuous labors on behalf of your constituents left you badly run down physically; you went to see your doctor; he advised you to quit work and go to a warmer climate, but you couldn't think of deserting your 'constits;' then a friend recommended this medicine; you took only one bottle, and it made you feel like a new man. See? I'll fix a nice letter for you. You sign it and give me your photograph. I'll write a little introduction, telling all about what you have done for the people, and how you have been often mentioned for mayor, and so forth. We'll run it in the leading papers all over the country. We won't have it printed here in town. It won't do you a bit of harm, and you'll do me a great favor at the same time."

The city official consented, with a grin, to the use of his name, and agreed to furnish a photograph. A dozen other city officials were found to be equally complacent.

* * * * *

It makes absolutely no difference, even if a dozen of our best friends were, before our very eyes, cured of a certain ache or ill by a certain preparation, it still is no argument that that special medicine will suit our particular case or cure our special ill. It should make no difference whether advertisements say to us that physicians, clergymen, statesmen, or men and women, in any profession, of whatever eminence, "indorse" this or that medicine. That has no bearing on our particular case. In the first place, we have seen, from the instance above quoted, how such "testimonials" may be secured, even if all are not secured in this way. In the second place, no physician of any standing in his profession, whose word is worth the having or whose advice is worth a penny, would publicly recommend, for general usage, any "patent medicine" ever concocted. And, in the third place, even if the "testimonials" are genuine and honorably secured, how can they possibly prove to us that such a medicine can be of the slightest use to us in our particular case? What is one man's meat is another man's poison.

There is no evil in America to-day so great as this accursed passion for self-doctoring; no evil that is so far-reaching in its absolutely dangerous effects, particularly upon women and children. And it is upon this evil that a certain portion of the "patent-medicine" industry thrives, with all its horrors of deception, fraud, and dangerous ingredients. Every device known to the ingenuity of man is resorted to by some of these "patent-medicine" concerns to keep the pub-

lic in ignorance of the deadly, dangerous drugs contained in their preparations; every manner of fraud and deception is practiced, and yet thousands of women and men persistently keep on in their use of some of these deadly or worthless drugs, not alone using them themselves, but, what is infinitely worse, giving them to their helpless children, who can not protect themselves from the habit thus created within them for a taste for alcohol, cocaine, opium, or morphine, fostered by the hands of their own parents. Strong words, you say. Yes, but that is precisely what thousands of parents are doing, and nothing less.

In every other phase of life, when we take a step upon which we think something important may hinge, we seek competent advice, or we take the time to investigate. If we seek the law we go to a lawyer. If we buy land we seek advice as to a clear title. If we build a house we seek the help or advice of a builder or architect. We will look into a school for our child; we will not trust even our own judgment to buy a horse or a piano. Yet, when we touch our own health, our own bodies—upon which our whole material existence rests—we take things into our own hands; we decide for ourselves what ails us and what we should take for that ail. We go out of our way to avoid competent advice; we think it clever, in fact, that we can do without a doctor. We boast of it that we can diagnose our own ills. We are elated at the very thought that we can save the doctor's fee. And then we do what? We either believe what somebody else tells us, who knows no more, and sometimes less, than we do ourselves, or we believe an advertisement, written either as I have shown above, or at the best to sell a certain ware, and swallow something—what,

we haven't the least idea except what the advertisement chooses to tell us is in the medicine—which, of course, it seldom does. And this is what we call intelligence, what some of us, in fact, pride ourselves on doing, while all the time a lot of quacks are laughing up their sleeves while they prepare their useless or harmful medicines, and wondering "how easy the public is."

[Extracts from an article in The Ladies' Home Journal for January, 1906, by Mark Sullivan. Copyright, 1906, by The Curtis Publishing Company and reprinted by permission from The Ladies' Home Journal.]

* * * After I had received these letters I determined to follow them to their source. I got in touch with the heads of the correspondence departments, not in one but in a number of these "patent-medicine" concerns. Not a single one of them differed from a prescribed mode of procedure. Each morning to the men in charge (men, mind you, these personal letters by women) come the thousands of letters of the poor and ignorant sick. Each letter is scanned with a speed born of long experience, and on it is marked a figure, 1, or 6, or 21—any number from 1 to 30. Then it is turned over to a typewriter, who looks in her "form-book" for letter No. 1, or No. 6, or No. 21, whatever number it may be. This "form-book," much more than the "medicine," is the most laboriously and carefully contrived asset of these companies. It is cunningly devised to contain among its 30 forms an answer to every possible variation of letter that an ignorant sick woman can write. No. 4 is the answer to a woman who complains of sick headache; No. 13, dropsy; No. 16, rheumatism, and so on. These "form" letters were all differently worded; they looked exactly like personal typewritten letters, but they all wound up, no matter what the disease

was, with the advice to take the nostrum made by the particular company. Remember that the number put on each letter was put there by a man—in nearly every case a man who was not a doctor. If you should go to him personally, and if he looked you over and diagnosed your case and prescribed for you, he could under the law be punished for practicing medicine without a license.

Then I came to the serious aspect of this prescribing by mail: How often do these men and clerks and typewriters make mistakes? For, mind you, these people work under factory conditions, at factory speed. A certain minimum of letters is required daily. In two concerns that I know each typewriter is required to finish one hundred and fifty letters a day. How often does the hurried clerk write 6 when he means 7? How often does a tired typewriter get her letters mixed, or misread the scribbled numbers on them?

Let me quote from the report of a detective of the Post Office Department who secured employment with one of the largest "patent-medicine" concerns in the country. This is what he said:

> The remedies are put up by young girls who are constantly making mistakes and sending men's remedies to women, and vice versa. They can't do otherwise, because they have to send out a certain number of treatments in a given time. In this way dreadful mistakes occur.

[Extract from an article in The Ladies' Home Journal for February, 1906, by Mark Sullivan. Copyright, 1906, by the Curtis Publishing Company, and reprinted by permission from The Ladies' Home Journal.]

Now, when one of these "medical institutes" is taken in hand by the United States Government, what do we find? Here is one of those "doctors"

and "institutes" which was brought to light recently by the Government. This "doctor's" name had become a "household word" in countless homes; hundreds had gone to his "institute" and "blessed his name"—so the free "medical book" and the circulars said. The Government first proved that the man's name was an assumed one. Second, that he was no doctor, nor had he ever practiced medicine. The "doctor whose name was used was dead!" The titles used to his name, the medical colleges of which he was represented as a graduate, were all, according to the United States records, admitted by the company to be false and fraudulent. It was next proven that all the representations of "First I cure you; then you pay me" were false.

The bait of "no charge for medicines" was also proven to be baseless and false, and lastly, it was proven—and mind you, from the mouths of the members of the company themselves—that it was the practice of this company fraudulently to extort from patients large sums of money for "medicines" and treatments which were not needed by the patients' conditions, under false and fraudulent representations to such patients that unless they pay for such "medicines," and take the same, diseases from which they are in no way suffering will quickly destroy their health and even reduce them to insanity. These affidavits and letters afford a true criterion of the fraudulent practices of this concern.

Another illustration of the methods used by these "patent-medicine" "institutes" shows that they almost invariably advise those who write to them to use their "medicines" whether they need them or not. The United States Post-Office Department gives this case. The department investigated one of

these concerns, and their inspectors reported as follows: "The business of the concern is fraudulent in that treatment is sold to patients who do not need it, in order simply to secure the money paid therefor." The post-office inspector, to prove this, "had a doctor fill out the symptom blank of this company for a wholly imaginary case, and which failed to show that the sender needed any treatment whatever, and sent the same to the company. Their reply to this symptom blank was that the party needed their treatment, which would be forwarded upon receipt of two dollars!"

There you have just a couple of pictures—all that I have room for, unfortunately—of a "free medical institute" game as seen from the inside!

Nice pictures, are they not?

POPULAR SCIENCE MONTHLY.

QUACKERY.

By DUDLEY F. SICHER,
Professor in Yale University.

(Extracts from a paper read before the Yale Biological Club, March 23, 1905, and published in the Popular Science Monthly for September, 1905. Copyright, 1905, by the Science Press and reprinted by permission from the Popular Science Monthly.)

What impresses one in reviewing the literature is the extent and ancient origin of quackery and the ineffectual fight against it. Eight pages of the "Index Catalogue of the Library of the Surgeon General's Office" are taken up with a bare list of books, pamphlets, and addresses exploiting quackery or aiming at last to deal it the long-evaded death-blow. As early as 1605 we find good Dr. Guybon riding out to the charge with "Beware of Pickpockets. Or a Caveat to sick folks to take heede of unlearned

phisitions and unskilfull chyrurgians"; but neither this heavy artillery nor the unbroken fire of subsequent English doctors could daunt the brave hosts of mountebanks who have marched on through the decades healing the well and making the sick remember their pains. English sovereigns down through Queen Anne continued to exercise the "Royal Touch"; in 1665 one Valentine Greatrakes successfully laid claim to this same healing power; a certain Dr. John Ward gloriously humbugged King George the Second; somewhat later, Elisha Perkins (1741–1799), of Norwich, Conn., son and father of Yale graduates, enthralled two continents—laity and physicians alike—with his Metallic Tractors. Then, in the early nineteenth century, floruit (on pickings estimated at fifteen thousand per annum) suave John St. John Long, of whom Dr. Francis R. Packard says: "The list of his patients reads like a directory to the fashionable quarter of London." These are only a few, the more gigantic vermin from out the dirty swarm. Everywhere and everywhen we meet with exploiters of secret remedies, unfailing panaceas, advanced treatment (sic), and all other alleged cures which stand as quackery (in the words of Dr. A. T. Schofield) "when used by unqualified men, or if they are advertised or puffed unprofessionally, or connected with any fraud or wilful exaggeration." But it was left for the modern era to furnish that strangest chapter—of an enormous spread of quackery along with progress in scientific medicine and the growth of education. Berlin, capital city of the world's least hysterical people, reports an increase of 1,600 per cent in the number of resident quacks since 1874. For England the roll call is answered by the British Medical Journal thus: "John Bull, for all his

boasted common sense and hatred of humbug, is still more quack-ridden than any member of the human family except his cute Cousin Jonathan." And as for "cute Cousin Jonathan's America—Champe S. Andrew, counsel exclusively retained by the Medical Society of the County of New York to expose medical frauds, is authority for the estimate that in New York City alone there are, against 6,000 regular practitioners, 20,000 quacks. In view, therefore, of its ancient origin, persistence, and recent spread it is not enough to account for quackery on the basis of the Irishman's observation that "there were always fools in this world; in fact, there must have been some lying around, waiting for the world to begin." * * * Rather is quackery a well-defined phenomenon, grounded on effective causes. Why it should exist at all, how the worst empiric enjoys custom, often from the cultured, and what measures may be aimed against this social evil are questions which invite examination.

* * * * *

Given, on the one hand, this set of causes—the limitations of scientific medicine, the pain and dread of disease, and the power of "auto-suggestion," and, on the other hand, depraved humanity, hard driven in the struggle for existence, but cunning in the knowledge of men, and you have the essential parts which, with a few minor pieces, make up into the smooth engine of quackery.

Every newspaper and magazine reader knows how well the quack makes capital out of the limitations of scientific medicine. When the regular practitioner is puzzled, he admits, or when the case transcends cure, he gravely shakes his head. The quack now steps in and begins where the other left off. He

"especially solicits obstinate cases;" "welcome the doubter and the skeptic." He realizes the persuasive value of bold assertion and big promises; how the exclamation point and the period may appeal more strongly than the careful interrogations of the honest physician. He talks much of the "thousands who testify to its success," and thus swaggers himself into the confidence of the poor invalid, whom the doctors, in good conscience, must acknowledge beyond their aid. With so many broken-hearted witnesses of the insufficiency of evolved therapeutics, almost any knave can steal a living by brazenly opposing some dominant practice in medicine—as surgery or the use of drugs. These "methods" nowadays have a pseudo-physiological basis; with a speciousness it is often hard to confute, tracing all disease back to "inside nerves," "sluggish circulation," and the like, they impress by the sweep of their assertion and their tone of scientific explanation. It is scant wonder that the pompous logic moves the incurable whom neither "knife" nor "drugs" can save, vapid ladies of fashion, and the smart shallowpate of "a little learning."

* * * * *

With such instruments at his disposal, restrained by no Hippocration oath or sacred reputation, left free to run riot by criminally lax laws, deliberately dead lettered, the genus quack swarms out over the land. Its species are unnumbered, being marked by every device deceitful ingenuity can conceive. Psychotherapeutics and knowledge of human nature constitute the quack's entire outfit; all he really needs is moral atrophy and the instincts of a cheap drummer. Such is the baleful etiology of medical quackery.

If confirmation of this diagnosis is desired, it may be sought in the recent spread of quackery and its especial vogue in America. Paradoxical as it sounds, the growth of education, while compelling the quack to improve his methods, has greatly extended his field. Formerly he seldom worked farther than his voice or circular might carry; now every literate is a potential victim. His wares are displayed in almost every piece of print that strikes your eye, for the publisher and "the press" he has subsidized and suborned. So-called family magazines (messes of popular fiction and indecent advertisements) are distributed gratis at the instance and backing of the quack, for whom they are so much purchased propaganda. To the same end he sustains the whole modern plethora of magazines and newspapers. Without his lucrative patronage periodicals, representing the real excess of supply over demand, would end their artificial existence, and so wherever there is a struggling paper manhood slumbers and the editor accepts the proffered bribe. How else explain the significant truth that the sectarian press ranks among the worst offenders? The "yellows," too, depend as much upon the quack as upon scandal, and the most prosperous of them all afford the grossest example. The editorial columns of a certain evening journal will no doubt to-night blare its owner's championship of the people, while almost every page invites the trust-ground toiler to hand up his savings to swindling men specialists and venders of alcoholic cure-alls. In fact, with a few notable exceptions—such as The Outlook, Life, and the New York Evening Post—the whole press unblushingly sprinkles its columns with the charlatan's cards. Nearly every

New York daily on January 24 reported, at lengths inversely proportional to its abetment of quackery, the exposé of Dr. Henry Kane's Radium Cure swindle; in the January 22 issue of one of the most reputable of them I find a conspicuous advertisement of this same discomfited wonder-worker. Shameless self-interest never could have played so slavishly into the quack's hands until the growth of education made publishing a fiercely competitive business.

* * * * *

Quarantine is proper; Government exposure of food adulteration is only right; of course, the State should protect its citizens against fraudulent investment schemes, and every enforcement of these safeguards calls out general praise. But it is ruinous paternalism to save the unwary public from unconscious alcoholism, medical extortion, and dangerous malpractice!

Of the same caliber, it seems to me, is that other plea against State interference, to the effect that variance from orthodox is not enough to brand a method as quackery. It is urged that progress consists in dissidence, and that the traditional school has no right to sit in judgment. "The prophet is never believed in his own country," you know. Such argument—and it is very common—sounds too much like the prattle of those "advanced thinkers" who would do away with the moral code on the ground that all standards are relative and arbitrary. Further the records fail to show a single instance where scientific medicine has drawn profit from quackery, nor is the modern broad and progressive attitude likely to cheat any honest radical of an adequate hearing.

POPULAR SCIENCE MONTHLY.

FACTS ABOUT NOSTRUMS.

By HORATIO C. WOOD, Jr., M. D., *University of Pennsylvania.*

(Popular Science Monthly for June, 1906. Copyright, 1906, by the Science Press and reprinted by permission from the Popular Science Monthly.)

* * * The two motives which most commonly lead to experimentation with advertised nostrums are the desire to avoid calling in a physician, and to save thereby the doctor's fee, and the hope that better results may be achieved than are offered by the regular medical profession. Occasionally, as in unsettled districts, the impossibility of obtaining medical advice forces "home treatment," but this condition is so infrequent that it may be practically disregarded.

In the majority of instances it is the indisposition to send for the doctor which explains the self-dosing, not always from the desire to save money, but at times from a sense of shame in annoying a busy man with some trivial complaint which the patient believes he can treat himself with equal benefit. This feeling covers the use of a large number of the less objectionable proprietary remedies such as the laxatives, but is also the predominant factor in the employment of the most diabolical of them all, the "soothing sirups," with which hundreds of nonthinking mothers are poisoning their children. One of the dangers which attend all self-medication, but apply with especial force to the habit of relieving seemingly trivial complaints, is that some serious trouble, still in its formative stage when proper treatment is most efficacious, is neglected until the damage wrought becomes irreparable. For example, a man is taken with what he believes to be an ordinary

"stomach ache" due to indigestion, and buys some "pain killer" or "dyspepsia tablet" with which he experiments on himself for two or three days; the physician called too late finds appendicitis gone on to a stage perhaps where a fatal issue is unavoidable. Again, in the spring of the year a feeling of languor is diagnosed by the doctor patient as "spring fever," for which he doses himself religiously with some stimulating "blood purifier," while the real nature of the case may be a beginning of typhoid fever. The list of such conditions which may and do occur might be drawn out ad infinitum, but enough has been said to show the great fundamental objection to all nostrums.

* * * * *

Those who employ patent medicines from the second motive mentioned—that is, with the hope of obtaining better results than are promised by the regular medical profession—are naturally found chiefly among the less educated classes of society. To an intelligent mind it is evidently improbable that an untrained observer whose interests are purely commercial should know of some remedy of great value which generations of devoted physicians and scientists had failed to discover. The claims made by this group of nostrum mongers are so palpably impossible as to be ridiculous to all thinking men. Yet it is surprising to find how many persons of presumable intelligence, driven by the desperation of an incurable disease, grasp at this frail straw in the hope of being rescued from untimely death. Such are found especially among cases of consumption, cancer, spinal disease, or other similar chronic complaints whose outlook is unfavorable. Many of the nostrums belonging to this class are quite inert,

while others contain opiates or stimulants which give temporary relief from symptons, but only hasten the end.

The question must present itself most forcibly, if the statements outlined above are true, How does it come that such a large body of the people continue to use these irrational remedies? This question is usually answered by attributing the results to "shrewd advertising." If shrewdness is synonymous with falsehood and blackmail, the answer is correct. While it is true that an enormous amount of money is spent in advertising, yet back of all these advertisements is a mass of deceit which in any other business would prove ruinous.

It is necessary to digress for a moment to obtain a comprehension of the factors which have made successful commercial methods, which under ordinary circumstances would mean certain failure. All patent medicines, with a few exceptions as the laxatives, may be divided into two classes, the inert and the dangerous. The harmful remedies which are employed are usually either opium, cocaine, alcohol, or acetanilid. All of these are drugs whose use is liable to lead to a craving for more.

* * * * *

It is clear that the task of the purveyors of inert frauds is a more difficult one than that of the vender of habit-forming poisons. But the methods of procuring new customers is essentially the same in each instance. To obtain fresh victims there is no depth of immorality to which the manufacturer of the nostrum will not stoop. The lies are of manifold variety, but of a few classic types.

The first of these, which may be denominated as the lie simple, is the extravagant claim to cure all

sorts of conditions, based simply on the statement of the owner of the drug. Sometimes these are fortified by offer of "money back if not satisfied," or one hundred dollars, or a thousand, or a million—it makes no difference, since it is never paid—"for a case which can not be cured," etc. As an example of the sincerity of these offers an illuminating correspondence is quoted from the Journal of the American Medical Association, as follows:

APRIL 21, 1906.

Drs. Brown and Lenox, Rogers, Ark., send us an account of a case of catarrh which was not cured by Hall's Catarrh Cure. The patient, Mr. Robert Parks, consulted these physicians for catarrh and stated that he had just finished his twenty-sixth bottle of Hall's Catarrh Cure, but instead of being benefited he was worse. Mr. Parks wrote to the Cheney Medicine Company, the maker of Hall's Catarrh Cure, giving his experience, and asking the firm to pay $100.00 in accordance with the advertisements: "$100.00 for any case of catarrh which it will not cure" or to refund the money he had paid.

The following is a copy of a letter which he received in reply:

TOLEDO, OHIO, *March 30, 1906.*

ROBERT PARKS, *Rogers, Ark.*

DEAR SIR: Yours of recent date received, and in reply will say, as we have already said, that many cases require much more than you have taken for a cure, and as this is the case and Hall's Catarrh Cure is not placed on the market on the 'No cure, no pay' plan, we would not feel at all justified in refunding the money paid for this trial of the medicine. Will further say that you have failed to state much regarding your disease, symptoms of same, of

how long standing, symptoms of the action of the medicine, etc. Had we more information concerning your case, we might have been able to make some helpful suggestions regarding the treatment.

Yours, very truly,

F. J. CHENEY & Co.

"A. G. A.

The second type of falsehood which is used by these manufacturers is the testimonial lie. Some obscure citizen who has been rescued from some imaginary complaint spills his gratitude to the nostrum manufacturer in a lurid if ungrammatical epistle. Sometimes, however, it is not an obscure citizen, but a prominent one, a Senator, or an admiral of the United States Navy, or some one equally before the public eye. Some of these testimonials are absolute fabrications. The boldness with which nostrum venders manufacture evidence is astonishing, and only comprehensible in view of the fact that there is usually no legal punishment. Some years ago Duffy's Malt Whiskey Company stated in their advertisements that it was recommended in consumption by Dr. ———, one of the most prominent physicians of Philadelphia, when, as a matter of fact, he had never tasted it nor prescribed it; but the courts offered no redress, and the only means of cleansing his reputation was an advertisement in the daily papers. Some of the testimonials are bought. (There is a firm in this country which is engaged in the sale of testimonials to nostrum manufacturers.) The following circular speaks for itself.

As you are aware, we have your testimonial to our remedy. It has been some time since we have heard from you, and so we thought best to make inquiry as to your present state

of health, and whether you still occasionally make use of Peruna. We also want to make quite clear that we have your present address correctly and that you are making favorable answers to such letters of inquiry which your testimonial may occasion. Remember that we allow twenty-five cents for each letter of inquiry. You have only to send the letters you receive, together with a copy of your reply to same, and we will forward you twenty-five cents for each pair of letters. We hope you are still a friend of Peruna, and that our continued use of your testimonial will be agreeable to you. We are inclosing stamped envelope for reply.

Very sincerely, yours,

THE PERUNA MANUFACTURING COMPANY,

Per CARR.

It would seem time for the law to intervene to stop this noxious traffic. Owing to recent agitation in certain magazines some effort has been made to restrict it, but it has met with vigorous opposition from a venal lobby. Those interested in the business argue that this is a free country and that each one must be allowed to use his own judgment as to what is harmful or beneficial. Such sophistry would be laughable if it were not used with such deplorable results. In almost every State of the Union the practice of medicine is rigidly controlled. The applicant must show not only proof of medical education, but must pass an examination given by the State, before he is licensed to practice. As sensible an argument would it be to say that every one has a right to practice medicine and that each one must use his common sense in choosing a doctor who is educated. In many States of the Union there are laws regulating the adulteration of foods. In but one or two States are there laws

preventing the sale of deadly poisons in the form of patent medicines.

Government is for the purpose of protecting society from the depredation of persons whose moral intuitions are below the average of the people in general. We hang murderers in order that they may find no further victims; we lock up thieves that our property may remain safe; we allow patent-medicine monsters to murder and to steal without restraint. The proprietors of these nostrums are to be classed as moral perverts, for while they may deceive the public with various statements concerning the value of their remedies they themselves are in no wise deceived. Being so, it becomes the duty of our legislative bodies to protect the community. The general public does not and can not be expected to separate the truth from the falsehood about the value of unknown drugs. When the poor, uneducated, epileptic whose mind has been enfeebled by disease reads in a respectable paper an advertisement backed with some testimonial, he can not know that the testimonial is false and that the claims are absolutely impossible, but readily becomes the dupe of the charlatan, throwing away both money and life in search of the 'Will-o'-the-wisp.'

Patent medicines leaflet No. 2. Published and circulated by the W. C. T. U.

A STUDY OF PATENT MEDICINES.

By Mrs. Martha M. Allen.

(Extracts from an address given at the National W. C. T. U. Convention at Philadelphia, 1904, and published by request of the convention.)

* * * Some publishers of religious papers when asked by our workers to discontinue advertising medicines which make drunkards and criminals, and idiots, while purporting to cure almost every known

disease, have replied that they could not run their paper without this advertising. If that excuse is true a great many papers will have to die within a few years, for as people become more enlightened as to the frauds perpetrated upon the sick by the extravagant claims made for these preparations, and the extortionate prices charged for them in proportion to their cost, they will cease to subscribe for papers which cater to such advertising.

The volume of the traffic in these medicines must be something enormous when one firm alone can boast of spending $5,000 a day in advertising, nearly $2,000,000 a year. An ex-employee of that company wrote an article for the December, 1903, issue of Physical Culture, stating that the wonderful medicine so extensively advertised and which has "cured" so many Congressmen was composed of a cheap grade of alcohol, burnt sugar for coloring, cubebs for flavoring, and water for bulk. The attention of the manufacturers was called to this statement, but they have never publicly denied it, nor sued the editor of the magazine for libel.

* * * * *

How is it that these concoctions, with their false claims to marvelous cures, have such a tremendous hold upon American people, who are supposedly educated, thoughtful, and observant? The reasons are many. One is, mistaken ideas regarding disease. Most people who have not made special study of the subject seem to regard diseases as distinct entities, for which there must be specifics. The drugs which they regard as specifics are endowed in the imagination of such people with attributes which belong to living, sentient beings. If the drugs are only swallowed they will know exactly what ails the sick person

and will go directly to the place affected and begin at once to set things to rights. But intelligent physicians are teaching to-day that diseases are simply deviations from normal health, due to many causes, and are never twice exactly alike, varying as the patients and their surroundings vary. Even the names of diseases are only convenient forms for indicating types. Consequently the medicine that is beneficial to one person may be of no service to another.

A second reason is human vanity. There is something mysterious about disease and medicine taking, and people love to appear to understand what is confessedly difficult of comprehension. Therefore to be able to recommend something new to friends and acquaintances which will surely cure their every ill entitles one to a recognition of superior knowledge. Especially is this vanity appealed to by having its picture prominently displayed in the daily papers. It is difficult to convince this class of people of the evil of patent medicines, for any such attempt appears to be an attack upon their claims to superior wisdom and is a hard knock to their self-conceit. They will not brook correction.

The secrecy connected with the composition of these medicines is a powerful factor in their appeal to the imagination. This secrecy is difficult to combat, for the reason that it is not an easy task to determine, even approximately, the constituents of organic compounds. Some of these things, however, are simple in their make-up, and when an analysis of them is made public the demand for them decreases perceptibly. Examples of these are some medicines advertised as germ killers, which analysts have reported as composed of mineral acids and water. In the face of the frauds which have been shown in

the nostrum business by Government chemists it is the part of wisdom to view all secret medicines with suspicion.

Methods of advertising must be considered in studying the popularity of these medicines. The persuasive power of reiteration is seen when a new medicine soon has immense sales because it is before the eyes everywhere—on billboards, chimneys, barns, and fences, and in newspapers and magazines. Then, the grateful testimonials from people who were "cured" completely captivate the thought of the ailing one longing with intensity for the return of health and strength. He does not know that these testimonials are frequently purchased. Nor has he heard that some of these "cured" persons have died, of the very diseases of which they claimed to be cured, almost as soon as their testimonials appeared in print.

* * * * *

Much interest was excited last summer by the report that the United States Government was analyzing many patent medicines with a view to the exclusion of their advertising matter from the mails, because they were of fraudulent nature. Later a statement was issued that only 14 preparations had been examined by request of the Post Office Department. All of these with one exception were reported upon as highly fraudulent. Of these, perhaps Tuberculozyne is the best known. The report says, "Not one of the ingredients is recognized as of any service in the cure of tuberculosis." There is no doubt that if most of the nostrums so industriously exploited in the newspapers and upon the farmers' barns were subjected to similar scrutiny a like report could be made upon them. When will people believe this? Must the sick be forever robbed and cheated

that the patent medicine manufacturers may wear purple and fine linen, and dine sumptuously every day?

* * * * *

Efforts have been made for protective legislation in some of the States by medical societies, *and also in Washington in connection with the pure food bill, but all without avail thus far.* It is said that measures to regulate the sale of patent medicines fail because of the opposition of the daily press, whose advertising interests are so closely allied with these preparations. A very clear scheme of the proprietary manufacturers to force newspaper cooperation in opposing adverse legislation was made public by the Druggists' Circular of July, 1904. At the annual meeting of the Proprietary Association, held in New York in 1894, a member proposed a plan for getting rid of the expense of lobbyists to look after their interests in legislative bodies. It was to insert into every advertising contract made with newspapers the following clause: "It is hereby agreed that should your State or the United States Government pass any law that would interfere with or restrict the sale of proprietary medicines this contract shall become void." This suggestion was not put into the form of a resolution, for it was considered unwise to put it upon record. The history of the attempts made at patent medicine legislation since that time indicate that this suggestion was adopted. It is well for us in undertaking to cooperate with the National Temperance Society this winter in working for laws to protect the health of the people, that we thoroughly understand the difficulties with which we must contend. This cooperation of the newspapers and the patent medicine men make this problem one not easy of solution, for what legislator will dare to do what newspaper men say he must not do?

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
O. A. JOHNSON.
No. 433.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

REPLY ARGUMENT ON BEHALF OF THE GOVERNMENT.

It is said in the brief on behalf of the defendant that—

> * * * each and all of the counts of the indictments are nothing more or other than an indictment founded upon the theory that the defendant is violating the pure food and drug act for the sole and only reason that the physician is in error as to his judgment of what his medicines will accomplish, and therefore presents the question as to whether a physician is subject to indictment under this pure food and drug act for transporting from one State to another wholesome, nondeleterious, nonpoisonous and otherwise properly branded articles, solely and alone upon the claim that his

> opinion as to what they will accomplish or what results they will produce after they arrive and are delivered to the patient, is false (p. 3).

This, in our view, is not an accurate statement of the case. The labels upon the packages shipped by defendant recited in the indictment speak of Dr. Johnson and of Dr. O. A. Johnson; but there is no averment that the defendant is a practicing physician. The only allegation with respect to him is that he is "doing business under the name of Doctor Johnson Remedy Company." The various recitations of the labels set forth in the several counts of the indictment, if we are to take them as statements of fact as to the occupation of the defendant, clearly show that under the designation of doctor he is engaged in making and vending nostrums of the kind commonly known as patent medicines, and which he represents to be a "mild combination treatment for cancer," and efficacious for the cure of cancer when in fact they are utterly worthless for any such purpose. And he is not subject to indictment because his opinion as to the efficacy of his compounds proves to be false or mistaken in the case of a particular afflicted person who uses them, but because his statements with respect to them upon the labels of the packages containing them are broadly and unqualifiedly "false and misleading." The indictment does not relate to the practice of medicine, but to traffic in nostrums.

But it is contended by the defendant, and it was held by the District Court, that the Pure Food and

Drugs Act of June 30, 1906 (34 Stat., 768), does not hold the manufacturers and venders of patent medicines criminally liable as for a misbranding under the act on account of any false or misleading statements as to the "curative or remedial" effects of their nostrums; and the propriety of that holding is the matter now in controversy in this case.

The act is designed, as its title proclaims, to prevent "the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes."

It accomplishes its purposes by the prohibition of adulteration and misbranding.

The object of adulteration and misbranding is a fraudulent one, to make gain to which the party is not entitled. The prevention of fraud is a proper purpose of the law, and there can be no inherent reason why the scope of a law should not be as broad as the evil of which it takes cognizance.

The motive of fraud is present when any article of food or drink is adulterated, or when a thing is branded as being something other than it is, and the same motive is present when an article is represented as being efficacious of results which it can have no possible tendency to accomplish.

The person who buys food or drink which has been adulterated or buys something under a misrepresentation as to its identity or quality is the victim of fraud, but the actual hurt to him may not be very great. The adulterated or misbranded food may

simply not be as gratifying to the palate as the pure and the genuine would be.

The hypochondriac or the sufferer from real disease who is induced by false representations as to the curative properties of a nostrum advertised as a specific suited to his case, or as a panacea for all the ills that flesh is heir to, suffers in worse kind and in greater degree than the victim of adulterated or misbranded food or drink. He does not simply suffer a loss of the pleasures of sense, but is confirmed in his hypochondria or invites the aggravation of his disease by the induced neglect of proper remedial agencies.

There are none so credulous as the victims of chronic ailments, real or fancied. Nothing appeals to them so strongly as a suggested remedy. The meanest fraud within the possible scope of an act having such aims as that of the act in question is that which takes advantage of this known weakness of human nature. There is no good reason why it should not be brought under the ban of the law.

A nostrum or patent medicine is a drug within the terms of the law. Section 6 provides:

> That the term "drug" as used in this act shall include all medicines and preparations recognized in the United States Pharmacopœia or National Formulary for internal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either man or other animals. (34 Stat., 769.)

Any substance or mixture of substances which is offered as a cure for consumption or cancer is certainly a "substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease." This is obvious and requires no discussion.

As to misbranding, the law provides in section 8, concerning drugs:

> That *the term "misbranded,"* as used herein, *shall apply to all drugs,* * * * *the package or label of which shall bear any statement, design, or device regarding such* article, *or the ingredients or substances contained therein which shall be false or misleading in any particular, and* to any * * * drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.
>
> That for the purposes of this act an article shall *also* be deemed to be misbranded:
>
> In case of drugs:
>
> First. If it be an imitation of or offered for sale under the name of another article.
>
> Second. If the contents of the package as originally put up shall have been removed, in whole or in part, and other contents shall have been placed in such package, or if the package fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivaative or preparation of any such substances contained therein.

It is to be observed that the language used is well adapted to prevent the later specific descriptions of misbranding from operating as limitations upon the first and general term.

The label is a misbrand—

1. If it bears any statement regarding the drug or its ingredients or substances which are false or misleading in any particular, *and*

2. If it makes a false statement as to the country of manufacture or production, and *also*

3. If it presents the article under a false name, and

4. If the original contents of the package have been removed and other contents have been substituted, and

5. If, in case the mixture contains any alcohol, morphine, etc., the quantity or proportion is not stated.

As two, three, four, and five are expressly added to number one, they can not have the effect of taking anything therefrom. They are added from caution as being of such a nature as possibly not to be included within number one.

We have, then, as the law of this case the provision that "any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either man or other animals" shall be deemed to be misbranded if the package or label containing it "shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading *in any particular*."

The defendant's nostrums are contained in packages which bear statements heralding them as a cure for cancer. These statements, the indictment avers, are utterly false and misleading. This averment of the indictment must be taken as true in this discussion and may be said to be true as a matter of common knowledge. Patient, diligent, and intelligent research and experiment of skilled and self-sacrificing physicians and surgeons have attained to the hope that a serum or antitoxin for cancer may be found, but so far the only known remedy is the cruel medicament of the knife, and it is the dread of this which more than anything else gains credence for the palpably false statements of the defendant's labels.

The case, then, is within the very letter of the law, for the statement of the label is not only false and misleading in some particular, but it is false and misleading in the one and only particular which would or could appeal to the victim of cancer—the assurance of cure, and that through the therapeutic effect of the nostrums offered. He knows what the knife means and he shrinks from that, but the regular practitioner offers him nothing better. Formulas he knows nothing about, but results he can understand. A cure, a positive cure, is offered to him, certified as to its achievements in other cases, bad as, or worse than, his own. His hope revives and he buys the nostrum, deceived by the statements made as to its curative powers.

The prevention of this can not be utterly alien to the purposes of an act designed to prevent the adulteration and misbranding of drugs and medicines.

In *Durland* v. *United States* (161 U. S., 306) Mr. Justice Brewer said (p. 313):

> But beyond the letter of the statute is the evil sought to be remedied, which is always significant in determining the meaning. It is common knowledge that nothing is more alluring than the expectation of receiving large returns on small investments. Eagerness to take the chances of large gains lies at the foundation of all lottery schemes, and, even when the matter of chance is eliminated, any scheme or plan which holds out the prospect of receiving more than is parted with appeals to the cupidity of all.
>
> In the light of this the statute must be read, and so read it includes everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future.

Here was a great and widely prevalent evil to be remedied, and the act in question was directed to that purpose.

The law did not come into being upon the first suggestion of the need for it. Bills introduced in the Fifty-seventh and Fifty-eighth Congresses failed to pass. But the movement for the legislation gathered strength with delay and opposition.

In the early bills the definition of drug was, "The term 'drug' as used in this act shall include all medicines and preparations recognized in the United

States Pharmacopœia for internal or external use." This did not invade the field of the patent-medicine man. He was not selling drugs as such, and was making no statements or representations as to the composition of what he did sell. He was dealing in cures, whose composition was his secret and to the world a mystery. His names, descriptions, and representations all had reference exclusively to the remedial qualities of his nostrum.

Senate bill 198, introduced in the second session of the Fifty-eighth Congress, however, enlarged the definition of drug by the addition of the clause, "also any substance to be used for the cure, mitigation, or prevention of disease." This plainly included patent medicines, since the very use for which they were offered was "the cure, mitigation, or prevention of disease," and especially the cure.

This extension of the scope of the bill at once developed a determined opposition. No one would dare, however, to broadly justify the methods of the nostrum venders, and so a false issue was raised. Medicine, Congress was told, was not an exact science, and no statement by anybody as to the remedial effects of any drug was universally accepted as true. So a law which prohibited any statement regarding a drug, as now broadly defined, which was false or misleading "*in any particular*," would bring into court as the subject of indictment matters which after all involved nothing more than honest differences of opinion between different schools of medicine and different disciples of the healing art. The controversies between

allopaths, homeopaths, osteopaths, mental healers, Christian Scientists, etc., should not be the subject matter of presentment by grand juries, nor of trial and determination by petit juries. So ran the discussion.

But this implied, indeed it positively asserted, that the bill did condemn expressly misstatements as to the remedial effects of a drug, and the objection made was simply that *the bill ought not to do this.*

With this construction put upon this language by all those who opposed the purpose which that construction would accomplish, Senator Heyburn, in the Fifty-ninth Congress, introduced his bill, No. 88, which, on June 30, 1906, became law.

Section 6 of that bill as introduced provided—

> That the term "drug" as used in this act shall include all medicines and preparations recognized in the United States Pharmacopœia or National Formulary for internal and external use; also any substance intended to be used for the cure, mitigation, or prevention of disease.

Section 9 of the bill provided—

> That such drug shall be deemed to be misbranded:
>
> * * * * *
>
> Second, if the package containing it, or its label, shall bear any statement regarding the ingredients or the substances contained therein, which statement shall be false or misleading in any particular, etc.

As to this language the objection was renewed that it applied to statements concerning the curative prop-

erties of drugs, and those interested against such a provision of law approved an amendment offered by Senator Hemenway to the second paragraph of section 9, as follows:

> Any statement regarding the existence or nonexistence or the amount or purity of any ingredient or substance contained therein, which statement shall be false or misleading in any particular.

The purpose of this amendment and its effect, if adopted, are obvious and were recognized to be so. They limited the statement to the formula of the medicine, to the nature, amount, and purity of its ingredients.

Senator McCumber proposed an amendment, which Senator Hemenway accepted as a substitute for his own and as accomplishing what his own would do, which would make the second paragraph of section 9 read: "Any statement as to the *constituent* ingredients, or the substances contained therein, which statement shall be false or misleading in any particular."

This amendment was agreed to by the Senate and so the bill passed that body.

In the House a number of changes were made in the bill, among others some in the numbering of the sections.

The bill as it passed the House provided in its section 5, which corresponds to section 6 of the law—

> That the term "drug" as used in this act shall include all medicines and preparations recognized in the United States Pharmacopœia or National Formulary for internal or external

> use, and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either man or other animals.

In this form and as a part of section 6 this definition of drug became law. It differs from the original Heyburn bill only as including a "mixture of substances" as well as any substance, and medicines for "other animals" as well as for man.

The scope of the definition was not narrowed but distinctly broadened.

Section 7 of the bill as passed by the House, corresponding to section 8 of the law, provided—

> That the term "misbranded" as used herein shall apply to all drugs * * * the package or label of which shall bear any statement regarding the ingredients or substances contained in such article, which statement shall be false or misleading in any particular, etc.

This is the provision of the original Heyburn bill with trifling and absolutely immaterial changes in phraseology. It is the provision objected to from the time it appeared in the McCumber bill of the Fifty-eighth Congress as including statements relative to the curative effects of the drug. *And it rejects the McCumber substitute for the Hemenway amendment.*

The Senate not concurring in the House amendments, the bill went to conference, and the conference committee reported as to misbranding, the provision

now contained in section 8 of the law, which denounces as "misbranded" all drugs "the package or label of which shall bear any statement, *design, or device* regarding *such article or* the ingredients or substances contained therein which shall be false or misleading in any particular," etc.

The words italicized show the change, made by addition, from the original Heyburn bill.

In terms the amendment makes the misbranding applicable to statements concerning the "article" as an entirety as well as to statements concerning "the ingredients or substances contained therein" which shall be false or misleading in any particular.

The conference amendments broadened the ban of the original bill. By making it applicable to the article itself, as well as to the ingredients or substances contained therein, it must necessarily include something more than misstatements as to the composition of the article.

So the legislative history is that the two provisions of the original Heyburn bill—the definition of "drug" and the definition of "misbranded"—objected to as so broad as to bring misstatements as to the remedial qualities of drugs and medicines under the ban of the act—were each of them extended by amendment in the very direction of which there was loudest complaint and to which most strenuous opposition was made by the venders of patent medicines.

Having failed in the effort to persuade Congress from doing what they insisted Congress was doing

and did do, they now say that Congress has done nothing of the sort. The history of the legislation and their part in it is a conclusive answer to their present contention.

A further consideration supporting the view of the Government is that there was little, if any, reason for including patent medicines at all if the law did not go to the extent to which the proprietors themselves said it did go.

The provisions against adulteration could not apply to these medicines. Unlike the medicines and preparations recognized in the United States Pharmacopœia, there exists for them no standard of composition, strength, or purity. What is the "cure for consumption," and what is the "cure for cancer?" No one knows. That may change from day to day at the will of the man who holds the secret of their composition. Either of them may be one thing one day and another thing another day.

For quinine, morphine, calomel, and other single substances or drugs recognized by the Formulary, and for the compounds and sirups mentioned by it, we have the standard prescribed by the Formulary itself. Where is prescribed the standard of "Cancerine Tablets?" Not in the Formulary and not upon the label which contains them. We may find by the analysis of one package of tablets that they consist of 90 per cent of sugar of milk, 5.50 per cent of sucrose, and 4.50 per cent of talcum. Another package may show a different composition, but neither can be said to be adulterated. The tablets are a secret compound

made for a certain use, and the only standard by which they can be judged is that of fitness for that use. That standard, however, it is now objected by the defendant, the law neither does nor should set up.

As to misbranding, we have the general prohibition of "any statement, design, or device regarding such article * * * which shall be false or misleading in any particular." In addition, there must be no misstatement as to (1) ingredients, (2) country of production, (3) name of the article, and (4) it must not be placed in a package which was originally used for another article, and (5) if it contains any alcohol, morphine, etc., it must state the fact and the proportion.

There is no statement as to ingredients and hence no misstatement. The law requires no statement as to place of manufacture, and there is no occasion for any. From the very nature of the case the cancerine tablets will be sold under their own name, for their name is whatsoever name the proprietor chooses to bestow upon them. They will not be an imitation of, nor will they be offered under, the name of another article, for they are designated only by their alleged remedial effects. And if what was yesterday offered as a cancer cure is to-day offered as a cure for consumption, it is to-day as truly a cure for consumption as yesterday it was a cure for cancer. Johnson's cure for cancer might, indeed, be put in a package originally used for somebody's cure for consumption, but that is not to be seriously apprehended and could not long continue, and no harm to the

public health could come from the mere fact of such substitution. The last requirement of the law as to branding would indeed be effective as to such preparations as contained any alcohol, opium, etc., but only as to these.

A nostrum containing no alcohol, opium, etc., is then under no ban in any matter of serious import except the general one that the package shall bear no statement regarding it which is false or misleading *in any particular*.

It is true of practically all patent medicines, as it is of cancerine tablets, that the only statements made, and the only statements that can mislead, are those relative to remedial properties. The cancer victim is not looking for a compound of sugar of milk, sucrose, and talcum—he knows nothing of these things—he is looking for a cancer cure. The defendant does not offer him a mixture of sugar of milk, sucrose, and talcum, but offers him a cancer cure. When the cancer victim asks for the cure from the man who says he has it, he has as high a right to get something which has a curative tendency as he has to get an antiseptic when he asks for that from his druggist, or sugar when he asks for that from his grocer.

The worst possible form of fraud with respect to drugs and medicines is that of conscious charlatanry. It is the bold assertion of that which he who makes it knows to be false, and which gains credit from, and relies for its success upon, the credulity of hope which suffering inspires.

The practice of medicine is in no way involved, for the sale of nostrums, whether as specifics or as panaceas, is not anywhere recognized as the practice of medicine. The States of the Union have perhaps all of them acts regulating the practice of medicine, and to regulate that practice is within the scope of their constitutional powers. These acts so far from recognizing the vending of nostrums as a branch of that practice are designed, as the Supreme Court of Missouri said in *State* v. *Hathaway* (115 Mo., 36, 47), "to prevent the imposition of quacks, adventurers and charlatans upon the ignorant and credulous."

The act here in question does not reach to any physician in the practice of his calling, even though he is disappointed in the effect of his prescriptions or is in error as to the mode of his treatment. He is in an entirely different category. Neither from this law nor from any other is he in any peril because of the limitations upon human power to heal disease or alleviate suffering.

The case of the *American School of Magnetic Healing* v. *McAnnulty* (187 U. S., 94) is not decisive of this case and is not even relevant to it. That case was decided upon demurrer to the bill, which alleged the absolute good faith of the complainants, and the court held that this allegation must be taken as one of fact and under the demurrer as true, and the consequence of this was that, the complainants being guilty of no fraud, the Postmaster General had no authority to issue a fraud order against them.

Nothing more was decided than that where there is no fraud there can be no fraud order. It was said very properly that the claims of magnetic healers could not be set down as false and fraudulent when made under an averment of absolute good faith which was admitted to be true.

There is no interference here with any freedom of belief. The act does not deal with mental healing, with cures by faith or prayer or Christian Science. As to divine interposition in human affairs, opinions are widely sundered as the poles, and the utmost aberration from the general standard may be consistent with the utmost sincerity. The faith of man in the efficacy of prayer, his belief in special providences are not within the scope of this act and may not constitutionally be brought under the ban of any law. But when a man makes a faith he professes the staple of a lucrative business, he is, like any other man engaged in lucrative business, subject to the discipline of the police power, and certainly if he falsely professes a faith in order that he may take venal advantage of those who sincerely hold it, he is practicing a fraud which the law may punish none the less that it hides itself behind a religious pretense. A man's standard may be wrong and he be honest, but he is not honest when he is false to the standard he professes.

The Pure Food and Drugs Act invades no right of conscience, and it applies to the conduct of those who come within its scope only the standards they profess. It simply condemns fraud, conscious fraud,

and there is no more difficulty of demonstrating such fraud here than in any other case in which it may exist.

The men who sell cures for cancer and other chronic diseases are not mental healers or Christian Scientists. They believe in the efficacy of drugs, for they deal in drugs. If they do not, their professions are false pretenses and their business a fraud. They do themselves prescribe a standard by which they may be fairly judged. They represent, as a matter of fact, as something which they know to be true, that they have found some drug or compound of drugs which has certain curative properties. They do not say that this medicine has no potency in itself, and that the healing virtue resides in the credulity or other state of mind of the sick. They propose a material agency to effect a material result. Here, they say, is a tablet composed of medicines which, taken into the human body, so act upon it as to eliminate cancer and restore health. This is dealing with facts. Medicine deals with facts. It is uncertain indeed and must deal experimentally. It progresses by induction. But because uncertain it is not immune from fraud or dishonesty. It is honest to deal with that which is unproven and experimental, provided it is dealt with as being so. The physician may administer a medicine of whose effect he is doubtful, when the present limitations of his art have left the matter in doubt.

But when a man disdains all doubt, when he asserts full knowledge, when he avows that which

can truthfully be avowed only after successful trial, and yet has sought to learn nothing and has tried nothing, he is not simply in error but is guilty of fraud; and the fraud is capable of proof, for it relates to matter of fact and not simply of belief.

The indictment alleges that the drug in question was utterly worthless and without effect as a cure for cancer, and that the defendant knew this. Allegations of this kind, if true, can be clearly proven. Let us assume that upon the trial it was shown that the tablets consisted of sugar of milk, sucrose, and talcum. If these elements have any efficacy as a cure for cancer the fact is known to those whose profession it is to treat disease as a material manifestation by material agencies. There is not admissible here any question of miracle or divine interposition, but of a known cause producing an anticipated result. If the profession do not know the fact, it can none the less be demonstrated, for the drugs named exist in abundance, and cancer is only too prevalent. If the defendant believed his statement to be true, there must be a reason for the faith that was in him. Dealing with cancer as a material manifestation to be healed by material means, he could honestly offer nothing as a cure unless he knew something of the nature of cancer and something of the therapeutic properties of the drugs and discovered a relation between the two that made for health. If it were testified by those experienced in the art of healing disease by medicine, that sugar of milk, sucrose, and talcum, or whatever else the

tablets were made of, had no therapeutic qualities which could possibly affect cancer tissue, then a *prima facie* case of actual fraud would be made against the defendant, but one easily overthrown if he had mastered a knowledge of his art to which no one else had attained. That *prima facie* case, however, would not be met by a defense that he knew nothing of cancer, knew nothing of the drugs he used, knew of no cure effected by them, but believed none the less that the drugs would cure cancer. This mere assertion of his belief would not be conclusive in his behalf any more than the assertion of the grocer that he believed that if he mixed sand with his maple sugar the compound would be all sugar. It is all one so far as concerns individual morals or public health whether a man offers something as a cancer cure which he knows has no curative quality or of which he knows nothing at all. He must know something or abstain from asserting knowledge. Whether he knows his nostrum to be worthless, or knows nothing at all about it, when he offers it as a remedy for any disease he is practicing a fraud and is making a statement regarding it which is false and misleading in the most important particular.

The law deals, and the indictment in this case deals, not with beliefs, but with practices. It is the practice of the defendant—his conduct of interstate traffic in nostrums—which is the subject of the prosecution. That practice is a bad one, and the motive inciting to it is a fraudulent one. In any case which could be suggested as coming within

the law, whether one of adulteration or misbranding, the motive could not be more base or more venal than here. So far, then, as concerns the purpose of the law to punish fraud as a crime on the part of the perpetrator, no case could be more clearly within its scope than this. As to the other side of the transaction, the case is not relieved for the defendant. If his compound be an entirely inert mass, if it is incapable of active mischief, it cheats the buyer of the whole sum of its price, and no case of misbranding foods can do more. But there is almost certainly the further harm here, that although the drug have in itself no potency of harm, there results from the use and the dependence upon it a postponement of proper means of relief, and inevitably the progress and aggravation of the disease from which the deluded victim is suffering. For such a practice it can not be that the defendant can gain immunity from responsibility to the law by the mere assertion of a belief which can not consistently with that practice be sincere. But even if we could imagine the charlatanry to be sincere which, always for a price, heralds its sure cures for cancer and consumption, and other diseases which have thus far baffled the most earnest efforts of medical science, it is still within the constitutional authority of the State and of the National Government, each acting within its own sphere, when the common sense of mankind condemns a belief as absurd, to forbid carrying that belief into a lucrative practice, to the hurt of others; and this, and no more, the act of Congress has done.

The law, as construed by the Government, is therefore clearly constitutional. It simply asserts the power of Congress to forbid heralding a drug as a cure for a disease for which it is not and, in the light of present knowledge, can not possibly be a cure. And the construction put upon the law by the Government simply gives to its terms their ordinary and usual import. The cancerine tablet is plainly a drug within the definition given in the law itself. And as to this drug the law forbids any false or misleading statement either regarding "*such article or the ingredients or substances* contained therein." It is stated concerning the "article" that it will cure cancer, and the indictment charges, what in this discussion must be taken as true, that the "article" is utterly worthless for any such purpose. This being so, the statement is false and misleading—as false and as misleading as if it was with regard to the "ingredients or substances contained therein." The statements upon the package regarding its contents must not "be false or misleading in any particular." The statements made in this case are false and misleading in some particular, unless it be true that the cancerine tablets are indeed a cure for cancer; and the defendant instead of being indicted as a vulgar cheat should be enrolled high among those who have been the benefactors of humanity. He should not shirk a trial, which is but the opportunity for such distinction.

F. W. LEHMANN,
Solicitor General.

APRIL, 1911.

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No. 433.

In the Supreme Court of the United States

OCTOBER TERM, 1910.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

VS.

O. A. JOHNSON, DEFENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

BRIEF AND ARGUMENT FOR THE DEFENDANT IN ERROR.

JAMES H. HARKLESS,
CLIFFORD HISTED,
Attorneys for Defendant in Error.

NUMBER 786.

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OCTOBER TERM, 1910.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

VS.

O. A. JOHNSON, DEFENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

STATEMENT.

The question at issue involves the correctness of the judgment of the lower court sustaining the motion to quash the indictment. The indictment was in six counts

I.

The first count of the indictment charged that the defendant, Dr. Johnson Remedy Company, shipped from the State of Missouri to the City of Washington a certain box containing certain unbroken packages of drugs as follows, to-wit: One unbroken package called and denominated as to the contents thereof "Cancerine tablets."

two unbroken packages or bottles called and denominated as to the contents thereof "Blood Purifier," one unbroken package containing "Special No. 4," one unbroken package, containing "Cancerine No. 17," one unbroken package containing "Cancerine No. 1" and that all of the said packages were misbranded within the meaning of the Act approved June 30, 1906, entitled: "An act preventing the manufacture, sale, and transportation of adultered or misbranded or poisonous or deleterious foods and drugs, medicines and liquors, and for regulating traffic therein, and for other purposes," in that a portion of the articles contained in said package, to-wit, the one marked "Cancerine Tablets" was branded as follows: "Complies with the food and drug act June 30th, 1906, Cancerine tablets. Take two tablets in water every three hours during the day. Do not take more than four doses in twenty-four hours. Prepared for and distributed by Dr. O. A. Johnson, 1233 Grand Ave., Kansas City, Mo."

The first count then proceeds to charge that this was a misbranding because the use of the words "Cancerine tablets" was false and misleading in the labels and brand in that it imples that the said tablets labeled "cancerine tablets" will cure and are effective in bringing about the cure of cancer when in truth and in fact said article was wholly worthless and ineffective to bring about the cure of cancer, etc.

precisely the same in import as the charge in the first count except that they deal with medicines of different names from the one charged in the first count. Each and

The second, third, fourth, fifth and sixth counts are

every one of the counts therefore, being predicated upon the charge that the remedies will not bring about the results which the physician prescribing them says they will, and hence, for that reason it is contended the pure drug and food act has been violated.

It will be noticed that there is no claim or contention in any of the counts of the indictment that the medicine or combinations of medicine prescribed by the defendant and so sold by him are not exactly what he says they are, or that there is anything contained in them that is adulterated, poisonous or deleterious to health, or that there is any statement, brand or intimation in the brand, that they are anything other than what in fact they are.

It will be seen, therefore, that each and all of the counts of the indictments are nothing more or other than an indictment founded upon the theory that the defendant is violating the pure food and drug act for the sole and only reason that the physician is in error as to his judgment of what his medicines will accomplish, and therefore presents the question as to whether a physician is subject to indictment under this pure food and drug act from transporting from one state to another wholesome, non-deleterious, non-poisonous and otherwise properly branded articles, solely and alone upon the claim that his opinion as to what they will accomplish or what results they will produce after they arrive and are delivered to the patient, is false. Does this constitute any crime under the pure food and drug act? We assert that it does not, and that if the law is to be considered to apply to such a situation it would be invalid.

PROPOSITIONS FOR WHICH WE CONTEND.

1. The purpose of the statute is to secure pure food and drugs.

2. As related to drugs the term "misbranded" used in Section 8 is confined to representations concerning the identity of the drug, its physical constituents, or chemical ingredients. It does not refer to claims for curative properties of such drugs.

3. A claim that certain beneficial results will follow the use of a prescribed drug or medicine obviously is not a statement of an existing fact, but is a forecast concerning a future event and is in the nature of things an expression of an opinion.

4. The court will take judicial notice that there are many different schools of medicine whose methods of treatment, and whose opinions concerning the curative properties of drugs and medicines radically differ—some refusing to ascribe any medicinal virtue to any drug under any circumstances. No method has yet been devised by finite man to harmonize these warring factions, and indeed, it cannot be said that the truth lies entirely with any one of them. Congress cannot under the circumstances be deemed to have intended by this legislation to invade a field so speculative and conjectural—certainly not in the absence of apt language clearly and irresistibly evincing such a purpose.

5. The drug is the subject-matter of the commerce. The brand or label which it bears is but an incident to the commodity itself and forms a part of the commerce in the article only in so far as it deals with the identity of the commodity contained in the package. But a statement which gives no in-

formation concerning the commodity itself, its physical constituents, or its chemical ingredients is not so related to the commodity as to form a part of the commerce in the article and is not, therefore, a part and parcel of the commerce within the regulating power contemplated by this statute.

6. This is a criminal statute creating and denouncing a new offense. All matters of doubtful interpretation are to be resolved in favor of the defendant and he should not be subjected to its pains and penalties except upon clear and undoubted warrant from the plain and inevitable language of the statute.

7. The construction sought by the government that this statute extends to claims concerning the curative properties of medicines or drugs would render the statute void as being beyond the power of Congress to enact.

8. By not giving to the statute an extreme and strained construction, grave and doubtful constitutional questions are avoided, and at the same time it is susceptible to such reasonable interpretation as to make it a vital and effective instrument in curing the manifest evils which prompted its enactment. Under such circumstances, therefore, there is no occasion for resorting to such doubtful and forced interpretation.

BRIEF AND ARGUMENT.

I.

OUR FIRST CONTENTION IS THAT THE ACT IN QUESTION CANNOT BE FAIRLY CONSTRUED AS EVIDENCING AN INTENT OR PURPOSE ON THE PART OF CONGRESS TO MAKE IT AN OFFENSE FOR A PRACTICING PHYSICIAN TO MAKE FALSE STATEMENTS AS TO THE CURATIVE EFFECT OF HIS MEDICINES AND THAT THE ACT IS DIRECTED AGAINST DECEPTION OR FALSE STATEMENTS PERTAINING TO THE DRUG ITSELF AND NOT AGAINST AN OPINION THAT MAY BE EXPRESSED BY THE PHYSICIAN AS TO ITS THERAPEUTIC EFFECT.

The Pure Food Law marks the entry by Congress into a new field of legislation. So far as we can ascertain it has never been called in judgment by this court in any of its aspects. We note the curious fact that its first appearance here is through the insistence of the government that it shall be given an extreme interpretation and that it shall by such judicial construction be extended to objects which would never occur to any one reading the act to have been within its contemplation.

The observation of Judge Brown of the United States District Court of Rhode Island is well worthy of quotation as a preface to our argument. He said:

> "It is especially necessary, in administering an act like the pure food law (however beneficial it may be), that there should be reasonable definiteness and accuracy, not only in the statement of

offenses against the act, but in conceptions of what is within the intent of Congress and what is not within that intent. In the administration of such an act it is particularly essential that it should not be given forced or strained constructions."

U. S. v. *650 Cases of Tomato Catsup*, 166 Fed. 775.

The object and purpose of the Pure Food and Drug Act of June 30, 1906 (found in the U. S. Com. St. Supp. 1907, p. 928), was to protect the public health against adulterated, poisonous and deleterious foods and drugs, and in view of such purpose, Section 8 of the act undertook to define what was the misbranding within the meaning of that act which would deceive the public upon the subject of adulteration, poisonous and deleterious articles, and in defining the word misbranding with reference to that subject the act provides: "The package or label of which shall bear any statement, design or device regarding such article or the ingredients or substance contained therein which shall be false or misleading in any particular, etc.

Now, it is apparent that the indictment in this case is predicated upon the hypothesis that the label upon the bottle or package implies that it is of a certain curative or remedial effect and that because of the claimed fact that it is ineffectual for the purpose indicated, that therefore it is misbranded within the meaning of the act.

The particular provisions of the act in question are as follows:

"Sec. 8. That the term 'misbranded,' as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design or device regarding such article or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the state, territory or country in which it is manufactured or produced."

That for the purposes of this act an article shall be deemed to be misbranded:

In case of drugs:

"First. If it be an imitation of or offered for sale under the name of another article.

"Second. If the contents of the package as originally put up shall have been removed in whole or in part, and other contents shall have been placed in such package, or if the package fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any such substances contained therein."

The indictment in this case is predicated upon the hypothesis that the label upon the bottle or package in question implies that it is of a certain curative or remedial effect and that because of the claimed fact that it is ineffectual for the purposes indicated and that the physician knew it that therefore it is misbranded within the meaning of the act.

Now it is apparent that no charge is preferred in

this indictment to the effect that the drug or medicine was adulterated or that it contained anything that was poisonous or deleterious, or contained less than was represented, or that in any respect whatever there was any misbranding as to the contents and compositions thereof. The substantive claim under the indictment is that the article as manufactured and transported would not produce the cures which the label said it would do. Hence, the question presented is as to whether it is an indictable offense or a crime of any character under this act, for a physician to make statements about his medicine which are false or misleading.

The very title of the act in question clearly manifests its purpose and intent. The matter which Congress had in view by the passage of this Pure Food and Drug Act was obviously to protect the public health against the evil effects of adulterated, poisonous or deleterious articles, and the misbranding of them is referable to the idea that if adulterated, poisonous or deleterious the brand must state the truth in reference to it, and there must not occur any misrepresentation in the brand or advertisement, or statement about the article that will permit persons to be misled on the question as to whether it is adulterated, poisonous or deleterious.

This was the underlying purpose of the Drug Act and to this end the first section of the act in question made it "unlawful for any person to manufacture * * * any article of food or drug which is adulterated or misbranded within the meaning of the act."

The language in Section 8 "the package or label of which shall bear any statement, design, or device regarding such article and ingredients, or substance contained therein, shall be false or misleading in any particular" must of course be considered and construed so as to have regard to the general underlying purpose and must necessarily be restrained and limited to the subject-matter of the act.

It must at all times be borne in mind that the whole act was to protect the public health against adulterated, poisonous and deleterious drugs. The subject of branding is a mere incident to the drug, the drug itself being the subject of the commerce. When Section 8 uses the expression in reference to the label and brand: "Ingredients or substance contained therein which shall be false and misleading" by no possible construction can it be extended to invite any controversy or inquiry into the question as to what results will be obtained. To give such a construction to this act as the Government obviously asked to have given would result in incongruous absurdity and would be permitting the Pure Food Department under the guise of the Drug Act, proper in itself when confined to its objects and purposes, to undertake to regulate the practice of medicine in the country. The defendant in this case is admitted, of course, by the purport of the indictment, to be a regular practicing physician, or at least, it is not claimed or intimated that the defendant is not in every way qualified to practice his profession and to treat the very subject that his medicines and prescrip-

tions are prepared to treat. But by this indictment it is sought to bring in review before a jury or the courts the correctness of the medical opinion of the physician who prescribes it and to try before such jury or courts, uninformed in the medical line, a question upon which learned physicians themselves may disagree. And so far as the law applicable to the right of physicians to practice their profession is concerned, all physicians thus licensed stand on an absolute equal footing, and must occupy such status. If the physician is incompetent or disqualified from the practice of his profession the states from which his authority emanates possess the power to revoke it for proper cause. The right of a physician to give his opinion to his patients or purchasers of his medicines as to the effect of a drug or prescription for which he claims remedial, efficacious results, is his inherent right. To give a construction to the Drug Act that would imply that Congress intended to say that a physician who prescribed a healthful, non-poisonous and non-deleterious drug is misbranding it because of the fact that he may express an opinion in conflict with others as to what results it will produce, is apparently exotic and unreasonable.

If we admit for the purposes of this argument, that Congress would even have such a power, it certainly ought not to be assumed that Congress intended such a result or purpose in the absence of a clearly express purpose to that effect. It trespasses upon the good judgment of the legislative body to attribute to them any such a

far-reaching and important result. If it was the intention of Congress (conceding their power to do so), to make it an indictable offense for a physician to express an opinion as to the curative effect of his medicines and prescriptions, or to hazard his judgment upon it, it certainly would have been expressed in more satisfactory and clear terms than found in this act. At the time this act was under consideration by Congress, and ever since, it was supposed and understood that it was justified only on the ground of protecting the public health, as it might be affected by interstate shipments of food, drugs, etc. It certainly was not proposed under the guise of this act to undertake to hold the manufacturers and vendors of prescriptions or medicines, or practicing physicians prescribing medicines, to criminal liability as depending upon the correctness or incorrectness of their opinions as to the curative properties of such prescriptions or formulae.

The question has always been, and we presume always will be, as long as the medical profession lasts, one of doubtful speculation, at least upon many subjects, as to the curative results of medicines and treatments. These opinions are almost as multitudinous as the members of the medical profession itself, and it is inconceivable that this act was intended to visit criminal liability upon a physician authorized to practice under the laws of his country, if, forsooth, he should be so presumptuous as to give an opinion to those who use his medicines as to what in his opinion they will accomplish.

We insist that the Drug Act, therefore, must be given

a sensible construction, besides a just one, and be restrained to its reasonable intendment, and that it should not be for the Pure Food Department or those engaged in its enforcement, to go beyond its beneficient purposes and enter the realm of speculation far beyond the legislative purpose. There cannot be found in this Drug Act, either by express language or implied construction, anything importing or in any way intimating that the opinion of the physician who prescribes it, as to its curative qualities, shall be construed as misbranding. Indeed, the act has in detail set forth what shall be construed to be misbranding as Congress has defined it, and in no particular does the act bear the impress of such a purpose. If it had been in contemplation to create an indictable offense for the vendors or manufacturers of medicines to say that the opinion given of what it will do, or of its healing properties if incorrect, was to be construed as a misbranding, or that the commendation of the medicine made by the vendors or the physicians prescribing it should be misbranding, if not in accordance with the opinions of others, certainly it should have been made clear, and apt words not only in the title, but in the act itself should be employed to convey such an extraordinary purpose. It would have been easy to have indicated a desire to invade this questionable field, questionable not alone as being contrary to common reason and judgment, but also as trespassing upon the authority of Congress to invade. It should not have been left to strained construction to read into the statute a purpose

so far-reaching and mischievous in its character, and striking out the very right of a physician to express any opinion whatever about the remedies he prescribes, except at the risk of criminal liability, if he should not be in accord with others on the subject. Physicians throughout the country would be in extreme peril, and hazard the risk of criminal prosecution by giving any written opinion to their patients or any explanation upon the prescription as to what it was intended to accomplish, where it should become the subject of interstate transportation. The result would be that the very purpose which a physician has spent his life to attain, and the years of arduous labor devoted to an inquiry authorizing him to express his opinion, is to now be declared as all in vain, if he mistakenly hazards it in his interstate business.

Referring now again to the act in question and above quoted, the first provision of Section 8 undertakes to say that the article shall be misbranded if it makes a false statement in any particular "regarding such article" or the ingredients or substances contained therein."

It will be seen that this section in its general terms refers not only to drugs but also to articles of food or articles which enter into the composition of food," and it may be properly said that when the section uses the term "false or misleading in any particular" as regards the *article*, it has reference to the prior expression "articles of food or articles which enter into the composition of food" and not to drugs, and that the false branding so far as drugs are concerned is limited to representations as to the substance or ingredients.

Section 8 deals with both *articles of food* and with drugs, and therefore used certain terms which must of necessity be limited to articles of food, and others of necessity confined to drugs, and eliminating such words as become necessary because of the food subject being incorporated with the drug subject, the act with reference to drugs would read like this:

> "Sec. 8. That the term 'misbranded' as used herein shall apply to all drugs, * * * the package or label of which shall bear any statement, design or device regarding * * * the ingredients or substances contained therein, which shall be false or misleading in any particular, and * * * to any drug product which is falsely branded as to the state, territory or country in which it is manufactured or produced."

The above is obviously its true reading as to drugs, and when so read, it became certain that the "false or misleading statement in any particular," must be confined only to the ingredients or substances.

However, by the further definition that:

In case of drugs it shall be misbranded:

> First. If it be an imitation of or offered for sale under the name of another article, or
>
> Second. If the contents of the package as originally put up shall have been removed in whole or in part and other contents shall have been placed in such package or if the package failed to bear a statement on the label of the quantity or proportion of alcohol, etc.

It is apparent that Congress has defined the particulars in which the drug article shall be misbranded, that

is to say, reading it as a whole it would be that if it was false as to the ingredients or substances contained in it, or, if it was an imitation or offered for sale under another name, or if the contents had been removed and others put in whole or in part, or if it did not bear a true statement as to the quantity or proportions of alcohol, morphine, etc., then it should be considered as misbranded, and when the section uses the words "false or misleading in any particular, it must have reference to and be confined to the particulars wherein Congress has defined "misbranded," that is to say by the use of the expression "misleading in any particular" these words must be constrained to apply and have reference to all of the particulars in which Congress has confined it, including also among the particulars a misstatement as to the state, territory or country in which it is manufactured or produced.

It will probably be urged by the Government that when the section above referred to uses the expression "regarding such article" that it was intended to say that anything that was false or misleading concerning the article was intended to be covered by the act, but we urge that this construction is not sustainable. The use of the words "regarding such article" can mean nothing more than having reference to what the article is, or, in other words, must be construed to have regard to a statement as to the identity of the article, and cannot be reasonably construed to mean what the party might say about the article's curative quality or value.

It was certainly the object and purpose of the act to insure the purity of, and to not permit the public to be misled as to, what the real article is, and that no deception should be practiced as to its real ingredients.

To illustrate, let us suppose that the article manufactured and offered for sale by the physician was calomel and stated to be calomel. Here, of course, no statement of the ingredients or substance would be necessary because calomel is the name of an article known generally. Now, if the physician in addition to stating that it was calomel shall state further that it is a cure for colds or dyspepsia has he violated the act because it might be asserted by others that the statement as to what it will do was untrue? Manifestly not. Upon the other hand, if he has stated that it is calomel when in truth it was not, then he would be making a statement in reference to the article as distinguished from the expression of an opinion as to what the article will produce as to results and consequently guilty of misbranding. The purpose of the act in its entirety was to produce purity in drugs, and honest statements as to what they are and what they contain.

In connection with these provisions which we have quoted it will be of interest to notice the provisions of Section 7 preceding the provisions we have quoted, which reads as follows:

> Sec. 7. That for the purposes of this act an article shall be deemed to be adulterated.
> In case of drugs:

First. If, when a drug is sold under or by a name recognized in the United States Pharmacopoea, or National Formulary it differs from the standard of strength, quality, or purity as determined by the test laid down in the United States Pharmacopoea, or National Formulary official at the time of investigation: Provided, that no drug defined in the United States Pharmacopoea or National Formulary shall be deemed to be adulterated under this provision if the standard of strength, quality, or purity be plainly stated upon the bottle, box, or other container thereof although the standard may differ from that determined by the test laid down in the United States Pharmacopoea or National Formulary."

Second. If its strength or purity fall below the professed standard or quality under which it is sold.

In the case of confectionery:

If it contain terra alba, barytes, talc, chrome yellow, or other mineral substance or poisonous color or flavor, or other ingredient deleterious or detrimental to health or any vinous, malt, or spirituous liquor or compound or narcotic drug."

Here it will be seen that immediately preceding Section 8 which we have been discussing, which uses the terms "false in any particular," are all of the provisions of Section 7 above quoted, which sets forth a great many particulars in which drugs shall be taken and considered as adulterated and misbranded, and the provisions of this Section 7 must also be understood as a part of the articles regarding which statements are made or may be made, and this re-enforces the conclusion that the use of the words "regarding such articles" and the use of the

words "false in any particular" as mentioned in Section 8 are referable to Section 7 as well as Section 8, and that the words "false or misleading in any particular" must have reference to all the various prohibitions found in Sections 7 and 8 as well as statements made "regarding such article" and hence must be given a meaning in harmony with the context of the whole provisions and to all such things as enter into or pertain to the article itself.

The statute in question is a new one and announces a new offense. The rule, as we understand it, in reference to these matters, is stated as follows:

> "A penal statute which creates and denounces a new offense must be strictly construed. A man ought not to be punished unless he falls plainly within the class of persons specified by such a statute. An act which is not clearly an offense by the express will of the legislative department of the government must not be made so after its commission by a broad construction adopted by the judiciary. The definition of the offense and the classification of the offenders are legislative and not judicial functions, and where, as in the base at bar, a penal statute is plain and unambiguous in its terms, the courts may not lawfully extend it, by construction, to a class of persons who are excluded from its effect by its terms, because, in their opinion, the acts of the latter are as mischievous as those of the class whose deeds the statute denounces."
>
> 137 Fed. 6 (l. c. 8) *Field* v. *U. S.*
> 5 Wheat. 96, *U. S.* v. *Wiltberger.*

Any argument in this case that a physician ought to be subject to punishment who should make a false state-

ment as to what his medicines will do is of no avail in this case even (if any such conduct could be made an offense), because it clearly does not come within the purview and purpose of this act.

Chief Justice Marshal, in the Wiltberger case, above cited, says:

> "The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute, is within its provisions so far as to punish a crime not enumerated, in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule for other cases."

If it be said in argument that Congress ought to have provided, that in interstate transactions, a physician should be guilty of a crime who should make a false statement in reference to what his medicines will do, it may be answered that this reasoning is illogical because that intention could not be attributed to Congress without plain and express words to make the representations as to the curative qualities an offense.

But another matter as bearing upon the construction of this act, the conduct charged in the indictment to con-

stitute a crime is said to consist of the fact that the physician has given a false opinion as to what his medicine will do, and this only. Now, if it be true that Congress did not possess the right, or if it be true that its right was doubtful to make it an offense in a physician to express his opinion as to what his medicines will do, then again, no such intention can be attributed to Congress.

This court in the case of the *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, has said, in reference to this expression of opinion of physicians attempting to treat others:

> "There is no exact standard of absolute truth by which to prove the assertion false and a fraud. We mean by that to say that the claim of complainants cannot be the subject of proof as of an ordinary fact; it cannot be proved as a fact to be a fraud or false pretense or promise, nor can it properly be said that those who assume to heal bodily ills or infirmities by a resort to this method of cure are guilty of obtaining money under false pretenses, ***such as are intended in the statutes,*** which evidently do not assume to deal with mere matters of opinion upon subjects which are not capable of proof as to their falsity."

And again in that opinion it is said:

> "As the effectiveness of almost any particular method of treatment of disease is, to a more or less extent, a fruitful source of difference of opinion, even though the great majority may be of one way of thinking, the efficacy of any special method is certainly not a matter for the decision of the postmaster general within these statutes relative to fraud. Unless the question may be reduced to one of

fact as distinguished from mere opinion, we think these statutes cannot be invoked for the purpose of stopping the delivery of mail matter."

And again this court said:

"And, turning the question around, can physicians of what is called the 'old school' be thus proceeded against? Both of these different schools of medicine have their followers, and many who believe in the one will pronounce the other wholly devoid of merit. But there is no precise standard by which to measure the claims of either, for people do recover who are treated according to the one or the other school. * * *

"Other instances might be adduced to illustrate the proposition that these statutes were not intended to cover any case of what the postmaster general might think to be false opinions, but only cases of actual fraud in fact, *in regard to which opinion formed no basis.*"

We call attention to this case by way of illustration and for the purpose of fortifying our position that it never was the intention of Congress by the Pure Food and Drug Act to invade the province of a physician to give this opinion upon the result and effect of his prescriptions or his medicines.

This court in *U. S. v. Del. & Hudson Company*, 213 U. S. 408, said:

"Looking at the statute from another point of view the same result is compelled. Certain it is that we could not construe the statute literally without bringing about the irreconcilable conflict between its provisions which we had previously pointed out, and therefore some rule of construction is

essential to be adopted in order that the statute may have a harmonious operation. Under these circumstances, in view of the far-reaching effect to arise from giving to the first two prohibitions a meaning wholly antagonistic to the remaining ones, we think our duty requires that we should treat the prohibitions as having a common purpose, that is, the dissociation of railroad companies prior to transportation from articles or commodities, whether the association resulted from manufacture, mining, production or ownership, or interest, direct or indirect. In other words, in view of the ambiguity and confusion in the statute we think the duty of interpreting should not be so exerted as to cause one portion of the statute which, as conceded by the Government, is radical and far-reaching in its operation if literally construed, to extend and enlarge another portion of the statute which seems reasonable and free from doubt if also literally interpreted. Rather it seems to us our duty is to restrain the wider, and as we think, doubtful prohibitions so as to make them accord with the narrow and more reasonable provisions, and thus harmonize the statute."

If this indictment can be sustained at all it must rest upon a forced construction of the words "in any particular," appearing in section 8. The argument would necessarily be along these lines, that the claim that the treatment prescribed will cure cancer is untrue, and that on the contrary, as said in the indictment, "the treatment is entirely worthless and without effect either in whole or in part as a cure for cancer." Therefore the claim upon the label of curative properties is both "false and misleading" and ergo a crime within the meaning of section 8. In other words, the argument may be summarized in

this, that if the statement on the label be false or misleading either as to the contents of the ingredients or in respect to any promise held out of good effects following their uses, the statute applies.

It will be, of course, observed that this argument gives to the words "in any particular" not only a liberal meaning, but the most extreme and far-fetched meaning imaginable, so that there is denounced as a crime, accepting this interpretation of the law, not only the statement of present facts and conditions, but representations or promises with respect to the future. In other words, the statute applies equally, whether it is a statement of a fact or the expression of an opinion. We submit that such an extreme interpretation of the language of the act is untenable for at least two reasons:

1. That the claim that ingredients will cure cancer is a statement of an opinion and not the representation of a fact; and

2. That if the words "in any particular" might have such extreme meaning it is manifest that they were not used in such a broad and comprehensive sense and they must be restrained within narrower limits and confined to the subject matter to which they relate.

As was said by Mr. Chief Justice Taney in *Brewer's Lessee* v. *Blougher*, 14 Pet. 78 at p. 198:

> "It is undoubtedly the duty of the court to ascertain the meaning of the Legislature from words used in the statute, and the subject matter to which it relates, and to restrain its operation within nar-

rower limits than its words import, if the court is satisfied that the literal meaning of its language would extend to cases which the Legislature never designed to include in it."

See *Petri* v. *Commercial Bank*, 142 U. S. 644, sustaining the jurisdiction of the Federal Court on grounds of diverse citizenship in a suit by the National Bank notwithstanding Section 4 of the Act of March 3, 1887.

See *United States* v. *Telephone Company*, 159 U. S. 550, sustaining jurisdiction of this court, and *McKee* v. *United States*, 164 U. S. 287, which upheld a restricted meaning in the statute as to certain persons who were entitled to re-payment of taxes paid.

Indeed, the entire act is in harmony with the view which we are advocating. It is again illustrated by Section 4, which commits to the Bureau of Chemistry of the Department of Agriculture "the examinations of specimens of foods and drugs * * * for the purpose of determining from such examinations whether such articles are adulterated or misbranded within the meaning of this Act." It provides that if it shall appear from any such examination that any of such specimens are adulterated or misbranded within the meaning of the Act, the secretary of agriculture shall cause notice to be given to the party from whom the sample was obtained with an opportunity to be heard. It is further provided that if it appears that the provisions of the Act have been violated such facts shall be certified to the proper United States district attorney, "with a copy of the results of the analysis, or the examination of such article

duly authenticated by the analyst or officer making such examination under the oath of such officer."

This section suggests these two observations:

1. That the function of the bureau of chemistry under Section 4 is obviously confined to a determination of the physical and chemical ingredients of the commodity under examination. For example, it would determine whether the drug was what it purported to be; and, again, it would determine whether the ingredients of the substance have been truthfully stated upon the label. In short, the chemists of that bureau would, through the processes of their laboratory, determine the truth of present and existing facts respecting the commodity contained in the package, and comparison of the results of their work with the statements on the label would at once disclose the truth or falsity of the label and whether the commodity had been in fact misbranded or not.

2. But the work of the chemists obviously only deals with the physical and chemical constituents and properties of the compound under examination. Yet there is confided to that bureau without limitation the determination of whether the article "has been misbranded within the meaning of this Act."

This, to our minds, conclusively negatives the idea that claims of curative quality were intended to be comprehended within the word "misbranded." Otherwise, it is plain that the Act would have provided a similar reference to some other bureau or authority for the ascertainment of the truth or falsity of curative claims.

Certainly it cannot be thought that a board of chemists were intended to pass upon a proposition not within the realm of either physics or chemistry, but which must necessarily be referable to some other department of learning skilled in the occult science connected with the diagnosing and treatment of diseases and their cures.

When this Food and Drug Act was before the United States Senate, a spirited debate took place in reference to the question as whether the language of this Act by the use of the expression "false or misleading in any particular" would be seized upon to justify a claim that a physician or vendor of medicines should be subject to punishment if they should make false statements as to the curative properties of their medicines. Three senators engaged in the discussion upon that point, to-wit: Senators Hemingway, Heyburn and McCumber, all lawyers of eminence; and we think it clearly appears that no such results as here contended for by the government was intended or desired.

The discussion is found in Vol. 40, part 3 of the Congressional Record, beginning at page 2724. For convenience we have attached at the end of this brief a verbatim copy of this discussion, which is marked "Appendix."

Mindful, however, of the clear and forceful opinion delivered by Judge John F. Phillips in sustaining the demurrer in this case, we feel that we have but feebly, if at all, added anything more cogent or helpful. His opinion, found in the record, is respectfully called to the court's attention.

II.

THE ACT AS INTERPRETED BY THE GOVERNMENT BEYOND THE AUTHORITY OF CONGRESS TO PASS.

We premise what we shall say with the following propositions:

1. The right of Congress to deal with the subject in hand at all is by reason of the fact that the drug is the subject of interstate shipment. The most broad and comprehensive extent of the power is none the less limited to such regulations as govern the shipment of the commodity, or which secure information concerning the subject of the shipment, its physical constituents or chemical ingredients.

2. The commerce involved in the transaction covered by the indictment is the vending and sale, and interstate shipment of the particular drugs and medicines. Representations which give no information concerning the commodities themselves, their physical constituents or chemical ingredients, are not in any sense related to and form no part of the subject-matter of said commerce.

3. A statute which should undertake to regulate or govern claims which shall be made concerning the curative properties of drugs, or which should attempt to make the giving of a false opinion in that behalf a criminal act, is an exertion of police power strictly. In no sense is it the exercise of a power to regulate commerce or any implied power flowing from such express power to regulate commerce.

4. The police power, however, in this behalf belongs entirely with the states, and cannot be undertaken to be exercised by Congress, and the Act accordingly, as thus construed, is an interference with

the police power reserved to the states and never delegated to Congress.

5. Even construed as an exercise of police power however, this statute, and particularly Section 8, as interpretd b ythe Government, is void as violative of certain fundamental rights and privileges of the citizen and would be in violation of the Fifth Amendment to the Constitution of the United States as well.

THE CLAIM OF CURATIVE VIRTUE A THING APART FROM THE COMMERCE IN THE COMMODITY.

However broad and comprehensive the commerce power of Congress may be, yet it has never been decided that it has vested Congress with an unbridled license in respect to all commodities which may find their way into the avenues of interstate traffic.

In the commodities decision by the circuit judges for the Third Circuit, Mr. Circuit Judge Gray made some observations bearing upon this power, its nature, extent and limitations, as well, which are so apt to the case in hand that we quote them under this head of our argument. We quote from *United States* v. *Delaware & H. Co.*, 164 Fed. 229:

> "It seems perfectly plain, then, that Congress cannot, in the exercise or pretended exercise of any legislative power conferred upon it, deprive any person within its jurisdiction of his liberty or property without due process of law, nor can it be questioned that, with the possible exception of the war power, this is true, no matter under color of what power such deprivation is sought to be accomplished. No

argument should be necessary, therefore, to show that this cannot be accomplished by an enactment in assertion of power under the commerce clause of the Constitution. Counsel for the Government, however, contend that any enactment of Congress which purports to regulate interstate commerce, and which actually does control, restrain or prohibit the same, or some part thereof, is such an exercise of power under the commerce clause of the Constitution as is subject to no limitation whatever, and cannot be challenged by any person, on the ground that it is violative of the inhibitions contained in the fifth amendment. In other words, if it be on its face a regulation of commerce, no right of personal liberty or property can stand in the way of its enforcement, but, on the contrary, every such right is only held and enjoyed, subject to the will of Congress in the exercise of its power to regulate interstate commerce.

This is a startling proposition, but is, as we think will appear, a necessary premise to the conclusion contended for by the Government. It is admitted by counsel for the Government that it has never yet been directly asserted in any decision of the Supreme Court, but they contend that it is deducible from certain judgments of that court, and is necessary to that fullness and completeness of control over commerce, which, begging the question, they say it was the intention of the Constitution to grant. It may avail nothing to say that it has never heretofore been imagined that a power so formidable as this lay dormant in the Constitution, ready to be aroused and exercised at the arbitrary will or caprice of Congress, because it is true that, in the development of our modern life, clearly existing powers that have lain dormant, or have only been partially exercised, have been made applicable to conditions unforeseen by those who framed the Constitution, but in these cases the powers invoked have

clearly existed, and were not predicated upon the supposed exigencies for their exercise. The consequences of establishing such a proposition as one of constitutional law may well be considered, if they be of such a character as to throw light on the intention of those who framed the Constitution, or to render it improbable that they ever meant to grant in the premises the absolute and unlimited power contended for.

It may be safely said, and we have before remarked, that the legitimate exercise of no legislative power granted by the Constitution is capable of touching at so many points, and in such a variety of ways, the every day life and business of the citizen. It is easy to see, therefore, that if it be subject to none of the limitations of the Constitution, and especially if the constitutional guaranty of life, liberty and property are of no avail to the citizen, rights which we have considered as most sacred and most secure may be overthrown and destroyed wantonly or arbitrarily by the will of Congress, provided that will is manifested by a regulation of commerce. It is small comfort to those who hate arbitrary or despotic power to say that when Congress, by an enactment, has deprived the citizen of liberty or property without due process of law, it was by expressing the will of their constitutents. We have since the foundation of the government rested secure in the belief that there are rights which the people themselves have placed beyond the power of governmental agencies, or of the majorities for the time being behind them, to impinge upon or destroy. The provision in the fifth amendment, declaring that no person shall be deprived of life, liberty or property without due process of law, would be a mere 'rhapsody of words,' without force or meaning, if so far-reaching and important a legislative power as the one we are discussing can be exercised without regard to its inhibition."

It in no manner detracts from the force of Judge Gray's observations that the decision of the Circuit Court was subsequently reversed by this court in 213 U. S. 366, because an examination shows that the statute in question was upheld by refusing to indulge the broad and unrestricted construction insisted for it by the Government. But on the contrary, as said by this court:

> "By restraining the wider, and, we thing, doubtful prohibitions, so as to make them accord with the more narrow and reasonable provision" (213 U. S. 412).

It, therefore, must be true that Congress could not, under the guise of regulating commerce, undertake to absolutely prohibit interstate shipment of a useful and wholesome commodity.

From this we argue that inasmuch as its power is not thus one of unbridled license, neither can it circumscribe and restrict the citizens' right to engage in such commerce beyond what would amount to a proper and reasonable regulation. That when it undertakes to do more than this, and under the guise of regulation prescribes duties and imposes restrictions which obviously are not regulations in any sense of the term, it has transcended the limit of its power and its act must fail.

Applying these principles to the case in hand as suggested in our head note, the commodity in question is the drug and the medicine which Dr. Johnson prescribed for his patient. It is that, and that alone, which gives life to the whole transaction, and it is due to the shipment of

that commodity that any of the regulations prescribed by Congress can apply.

Now, obviously, it is entirely within the competency of Congress, as it has done by this Pure Food Act, to see to it that this commodity shall be faithfully and fairly branded and labeled. If it is calomel it may not be sent under a disguise of some other name. If it is an adulterated product it cannot be represented to be pure, and if it has undertaken to state the chemical ingredients of the commodity they must be fairly and faithfully stated upon the label. In short, every information which discloses that the thing which is shipped is what it purports to be, and is what it is represented to be, must be fairly and truthfully stated.

But, when Congress should undertake to enter the domain of speculative science and should seek to test either the truth or the accuracy of claims advanced concerning curative properties of a drug, otherwise fully and honestly labeled, it has gone beyond its province of regulating commerce. It being therefore clear that the particular subject-matter of the commerce in question is the drug itself, only those related matters may fairly be said to be a part of such commerce as furnish information concerning the commodity that is contained in the package. Puffing statements concerning the claims of virtue from the use of drugs, whether modest or extravagant, form no part or parcel of the subject-matter of the commerce. In other words, so long as the vendor shall honestly and fairly inform the public of what is con-

tained in the package he may exploit his wares as he pleases, he may advance opinions concerning their curative properties with which others may differ, and he may make claims of results which will follow their use, which to some may appear unreasonable. And yet, so far as the exertion of the particular power with which we are dealing is concerned, such matters are entirely beyond its scope. If this is not so, but on the contrary the law is such as the Government contends in this instance, then we might at once dismiss the police power of the states and the countless statutes passed by the states in the supposed exercise of their police power with respect to, perhaps, a majority of the transactions in the business world. That is to say, it appearing that by far the majority of business transactions pertain to interstate commerce more or less closely, we shall soon see Congress passing statutes regulating in every conceivable aspect not only the actual preparation and shipment of interstate commodities, but the prior conduct of the parties out of which such shipments may have arisen, no matter how remote it may have been. For example, Congress might enact a law making it a misdemeanor for anyone to obtain property by false pretenses which was at the time in the course of interstate shipment, or perhaps a statute making it a felony to steal horses for the purpose of shipping them into some other state or into some foreign country. A case perhaps more analagous to the one at bar would be a statute denouncing it as a crime for one to procure an inter-

state shipment of merchandise to be made to him under false pretenses.

Applying a situation entirely parallel with the facts at bar we can confidently look forward, if this construction should be upheld, to a law denouncing as a crime the making of puffing statements or representations concerning the durability and ability to do the work claimed for them of all manner of mercantile articles, household implements, farming machinery, utensils, etc. The source of power is the same. There can be no difference in principle between a statute which should undertake to punish the manufacturer of a flimsy, poorly contrived cultivator which would utterly fail to do the work claimed for it contrary to express representations attached by way of label on the cultivator, and a statute which should undertake to punish a physician because of untruthful claims of curative properties of a medicine, the ingredients of which are none the less fairly stated on the label.

No analogy supporting this power is to be derived from the acts of Congress concerning the fraudulent use of the mails, for the all-sufficient reason that by another constitutional provision Congress is completely endowed with all power upon that subject. There is not the slightest difference in respect to the power of Congress in that connection, whether the mail which is carried is between the states or not. The states are given no right of control over such matters, and therefore manifestly this power must be lodged in Congress.

AMPLE POWER IN THE STATES UPON THIS SUBJECT.

But let it not be understood that because Congress may not punish offenses of the character we are discussing, that such offenses may go unwhipped of justice. On the contrary, ample power is lodged in the states in that behalf. It is unnecessary for us to do more than cite the recent decision of this court in *Keller* v. *United States*, 213 U. S. 138, to the effect that the police power is reserved to the states and there is no grant thereof to Congress in the Constitution.

In *Plumley* v. *Massachusetts*, 155 U. S. 461 (l. c. 472), this court said:

> "If there be any subject over which it would seem the States ought to have plenary control, and the power to legislate in respect to which it ought not to be supposed was intended to be surrendered to the general government, it is the protection of the people against fraud and deception in the sale of food products. Such legislation may, indeed, indirectly or incidentally affect trade in such products transported from one state to another state."

THE STATUTE AS CONSTRUED WOULD BE VOID FOR INDEFINITENESS.

Assuming, however, that the power claimed by the Government might be rightfully exercised by Congress, the statute in question cannot lawfully be extended to such purposes.

First, and primarily, because it does not with any particularity define what would constitute a crime, but

leaves it open for subsequent judicial definition. The only thing upon which the offense could be predicated, of course, is that portion of Section 8 which provides that any statement, design or device regarding such article, or the ingredients or substances contained therein "which shall be false or misleading in any particular." This means that the crime is equally committed whether the falsity of the statement relates to a material element or to some immaterial aspect. Nay, more, it may be both true in fact and in all particulars, but if it shall be in the slightest degree misleading, whether in a material feature or in some inconsequential matter, a crime has none the less been committed. The case at bar furnishes perhaps an apt illustration. By reason of the idiosyncracies of different men, and difference in surrounding circumstances, a drug or prescription may have a curative power when applied to one or when applied to ninety-nine out of one hundred men, and yet be utterly without medicinal value to the one-hundredth individual.

The debate in the Senate, which we have attached as an appendix to this brief, suggests many other illustrations of this truth, and yet unless the courts shall undertake a legislative function and with more precision and particularity define what shall constitute the crime, it would be an impossibility for any man under this statute to know in advance whether he was or was not committing a crime when he was sending forth his claims of curative properties of the drugs and medicines which he was shipping. Every vendor of patent medicines, many

of them standard household remedies, would be amenable to the pains and penalties of this enactment, as thus construed, because it is a well known fact that in any number of instances, more or less exceptional, due to difference in physical condition and environment of their patients, the medicines will not perform that which is claimed for them.

It will not do to attempt to avoid the embarrassment thus inevitable from a uniform and horizontal application of the statute as thus interpreted by the Government by attempting hereafter, by judicial construction, to clip its wings and circumscribe and restrain the statute in its general and comprehensive application. Of course, to do so would be judicial legislation and nothing else, and would be to advise people of what the criminal law is, not by what the statute itself proclaims, but by what the opinion of the varying judges might hereafter be, after the event.

It needs no citation of authority to this court, of course, that the fundamental right of the citizen is that a statute defining a new offense shall be so couched in clear and unambiguous language that one may know in advance exactly what it does mean, and that it shall clearly and positively describe the offense denounced, and not leave it as this statute does, a matter of subsequent judicial ascertainment.

2. Again, who is to say that the opinion of the curative properties of drugs and medicines is or is not well founded? We have heretofore adverted to the well known

fact that there exists in this country a great number of schools of medicine and that there are other cults who refuse to admit any curative properties or virtues to any drugs or medicines under any circumstances. Perhaps if we should have a jury composed of allopath physicians they might utterly repudiate the medical theories and claims of some homeopathic remedy and find that such claims were false and misleading, because, clearly, they would be false and misleading from the standpoint of the allopath. Or, supposing the allopath physician should find himself in the unfortunate attitude of confronting a jury of Christian Scientists. It would go hard with him to make such a jury believe that his doses and nostrums could accomplish anything except positive detriment and injury to the patient.

3. The truth of the matter is that the biggest trust in the United States at the present day is the medical trust dominated by the so-called regular physicians. We betray no secret when we suggest that it would be a matter of great rejoicing among that learned and distinguished body if they could hail the day when the patent medicine concerns and all rival schools of medicine should be put completely out of business. Far be it from us to suggest that any such a motive may lie behind, or at least be remotely connected with the initiation of the present prosecution.

4. But another question arises under this statute. Suppose that upon the trial of Dr. Johnson under this statute, charging him with falsely claiming curative vir-

tues in these remedies, it should develop that there does exist among those skilled in the practice not only the differences in opinion which spring out of the varying schools of medicine, but also differences of opinion in any single school upon the question. Does it then become a matter of fact within the terms of the Act to be submitted to the arbitrament of a jury, or is it such matter of opinion that as said by this court in the Magnetic School of Healing "would be incapable of judicial ascertainment and decision." Yet, from the very nature of things and the wording of this statute, it is inevitable in advance of any such a trial that exactly such a condition would arise. This court, of course, knows of the divergence of opinions among doctors concerning the curative properties of all medicines. This statute, without limit, has undertaken to say that a man who makes a claim of such curative property shall be guilty "if his claim be false or misleading in any particular."

The whole subject is thus, as we have reiterated, plunged into unfathomable obscurity so that no man can tell in advance what the crime is with which he shall be charged, and what the evidence will be which he will be called upon to meet.

This court said in 129 U. S. 122, l. c. *Dent* v. *West Virginia*:

> "Few professions require more careful preparation by one who seeks to enter it than that of medicine. It has to deal with all of those subtle and mysterious influences upon which health and life

depend, and requires not only a knowledge of the properties of vegetable and mineral substances but of the human body in all its complicated parts, and their relation to each other, as well as their influence upon the mind. The physician must be able to detect readily the presence of disease, and prescribe appropriate remedies for its removal. Everyone may have occasion to consult him, but comparatively few can judge of the qualifications of learning and skill which he possesses. *Reliance must be placed upon the assurance given by his license,* issued by an authority competent to judge in that respect, that he possesses the requisite qualifications. Due consideration, therefore, for the protection of society may well induce the state to exclude from practice those who have not such a license, or who are found upon examination not to be fully qualified. The same reasons which control in imposing conditions upon compliance with which the physician is allowed to practice in the first instance may call for further conditions as new modes of treating disease are discovered, or a more thorough acquaintance is obtained of the remedial properties of vegetable and mineral substances, or a more accurate knowledge is acquired of the human system and of the agencies by which it is affected."

5. This statute is also bad as construed, in that it wholly ignores the necessity of a criminal intent. While we recognize that there are a class of statutory offenses which might make the crime complete where they are violated even without the presence of an absolute criminal intent, we submit that this statute does not meet such a condition.

See:

Pettibone v. *United States*, 148 U. S. 197.
United States v. *Carl*, 105 U. S. 611.

Certainly the general rule is that criminality will not be imputed unless an act is done in bad faith or with an intention of violating the law, but under the Act as construed by the Government, there is no necessity either of intent or even of knowledge that the offense is being committed by the accused. For the reasons which we have pointed out in detail, indeed it would be impossible to show that the accused did have knowledge that he was violating an act. This is because if the test of his crime is to be determined either by its application to special and peculiar cases or by the judgment of others entertaining a contrary opinion from him, he cannot tell in advance what the judgment upon his opinion is going to be.

Respectfully submitted,

JAS. H. HARKLESS,
CLIFFORD HISTED,
Attorneys for Defendant in Error.

Dated December 26th, 1910.

APPENDIX.

From Vol. 40, part 3, Congressional Record, page 2724:

Mr. Hemenway: Mr. President, I ask that the amendment which I have offered may be stated.

The Vice-President: The amendment will be stated.

The Secretary: In Section 9, page 7, line 11, after the words "regarding the," it is proposed to strike out "ingredients or the substances," and to insert "existence or non-existence or the amount or purity of any ingredient or substance," so as to make the clause read:

> That such drug shall be deemed to be misbranded.
>
> * * * * * * *
>
> Second. If the package containing it or its label shall bear any statement regarding the existence or the non-existence or the amount or the purity of any ingredient or substance contained therein, which statement shall be false or misleading in any particular or if the same is falsely branded as to the country, state or territory or place therein in which it is manufactured or produced, or if the contents of the original package shall have been removed, in whole or in part, and other contents shall have been placed in such package.

Mr. Hemenway: I ask the letter which I send to the desk be read, and I should be glad if the senator from Idaho will give it his attention.

The Vice-President: Without objection, the secretary will read as requested.

The secretary read as follows:

The New Willard,
Washington, D. C., February 20, 1906.

Hon. J. A. Hemenway,
United States Senate,
Washington, D. C.

Dear Sir: I sincerely trust that your proposed amendment to Senate Bill 88 will meet the approval of the Senate. Every honest man is opposed to the adulteration or false labeling of drugs; but this bill, in the definition of the term "misbranded," as applicable to drugs, goes much beyond that purpose.

Section 9 provides, among other things, that a drug shall be deemed to be misbranded:

If the package containing it, or its label, shall bear any statement regarding the ingredients or the substances contained therein which statement shall be false or misleading in any particular.

This covers very much more than misbranding or false labeling, as commonly understood. Carried to its full length it means that the Federal Government, under the guise of regulating interstate commerce, is to take up and settle by its chemical experts and in the federal courts a class of questions about which medical men and schools of medicine have been at war for generations. If it is desirable that questions concerning the curative properties of drugs should be settled by process of law, it would seem to be a question for the states rather than for the Federal Government.

The slight change of phraseology proposed by your amendment makes the definition of the term "misbranded" more specific and excludes the implication that statements made in good faith regarding the therapeutic qualities of medicine or its ingredients can be made the basis for denying the right to transport such drugs from state to state.

Manufacturers have had no opportunity whatever for a hearing upon this or other questions be-

fore the honorable committee at the present session of the Senate; but at the hearing before the honorable committee during the second session of the last Congress his question was discussed, and the honorable chairman of the committee, in explaining some of the purposes of the bill, said:

"I have a very good illustration right here in my hand. Here is a bottle marked 'Pepto Mangan.' It says, 'does not affect the teeth.' There is a statement as to the truth of which the purchaser is entitled to know. This bill provides that if that statement is untrue it shall be a contraband article. What objection is there to it, supposing it does affect the teeth?"

And again:

"We will take Glyco Thymoline. There are a good many things stated upon this package. The purchaser takes the statement to be true. It states what the medicine will do. Suppose that statement is untrue. Then the article becomes contraband under this proposed law. Should it not be so?" (See Senate Report No. 1209, pp. 97 and 98.)

We are bound to assume that the interpretation of the provisions and the purposes of the bill by the honorable chairman of the committee is correct.

I am sure that a determination on the part of the Federal Government to take up and settle questions of this character in connection with interstate commerce would precipitate endless controversies in all parts of the country. Prosecutions would be inaugurated by the Agricultural Department, and as these prosecutions might be based in many cases upon medical questions upon which different men entertain different beliefs, it would become a matter of vital importance in some cases as to what school of medicine controlled the Government department having the subject in charge.

> I very earnestly hope that your proposed amendment, or something equivalent, will be adopted, so that no drug shall be deemed to be "misbranded" under this bill by reason of any statement made in good faith relating solely to the medicinal properties of the drug or its ingredient.
>
> Very respectfully yours,
>
> A. R. Beardsley.

Mr. Hemenway: I wish to call the attention of the senator to the statement made in the hearings, I think a year ago:

> We will take Glyco Thymoline. There are a good many things stated upon this package. The purchaser takes the statement to be true. It states what the medicine will do. Suppose that statement is untrue. Then the article becomes contraband under this proposed law.

I understand that here is a standard medicine—a medicine used in many families for many years. Suppose some one in a family comes up and says, "Here is a statement that this medicine will do things which it will not do." Who determines the question—the secretary of agriculture?

Mr. Heyburn: The patient.

Mr. Hemenway: So one patient will determine that this medicine will not do what it is recommended it will do by the label on the bottle. Then it immediately becomes contraband. Am I right about it? If I am right about it, does the senator think that is a proper provision to have in the bill, and does he not think my amendment, if it cures the defect, ought to be adopted?

Mr. Heyburn: The medicine becomes contraband not because of the quality of the medicine, but because the man has made an untrue statement. It is the label and not the medicine which makes it contraband.

Mr. Hemenway: Does the senator recognize the fact that a medicine which has cured a hundred persons might not cure the hundred and first one? Then, if that person is not cured, and he goes to the secretary of agriculture and proves that it did not cure him, that it did not do what it was represented it would do, the article becomes contraband?

Mr. Heyburn: Yes. Let the man say, "This is a remedy for it," or "it will cure in some cases"; that is all. He can relieve himself of the pains and penalties of the statute by telling the truth about his medicine.

Mr. Hemenway: Then, in the sale of this medicine, which I suppose hundreds of mothers all over the country have on hand to cure the throat trouble of their children, you would have him say upon the bottle in place of "this medicine being a cure for these diseases" that "in some cases it will cure."

Mr. Heyburn: I would say it was a medicine for the purpose of curing these diseases.

Mr. Hemenway: Why, in a case of this kind, can——

Mr. Heyburn: I will ask the senator a question if he will permit me.

Mr. Hemenway: Certainly.

Mr. Heyburn: How can any man defend the

claimed right of a party to tell an untruth to an unsuspecting public about a medicine sold on the general market, for which there is no possible——

Mr. Hemenway: That is exactly what I seek to avoid by my amendment. It reads:

> If the package containing it or its label shall bear any statement regarding the existence or nonexistence or the amount or purity of any ingredient or substance contained therein, which statement shall be false——

then he shall be punished. What objection is there to it?

Mr. Heyburn: I will say to the senator there is this objection, that that is a negative to the exclusion of the positive. He need not put any statement on it at all.

Mr. Hemenway: Does not that amendment avoid this condition? Here are two good medicines on the market, and their manufacturers are rival concerns. One comes along and says, "Your medicine does not do what you claim it will do." The medicine may be a first class medicine, just as is the medicine to which I have called the senator's attention here, but they may find one individual whom the medicine has not affected as it does affect the average individual. You go then to whom? To the secretary of agriculture, do you not? Does he try this question?

Mr. Heyburn: Not at all.

Mr. Hemenway: Who does try it?

Mr. Heyburn: The court, and nobody else.

Mr. Hemenway: Then you must go to the court; and that is just what I am seeking to avoid. You would

have continuous trials in the courts of the United States.

Mr. Heyburn: I think one trial would settle it.

Mr. Hemenway: Why settle it? I put this case right here. Here is a medicine that the senator must admit is a standard medicine. Then if some one is seeking to injure the reputation of this medicine in order to build up the reputation of his own, should go to court and prove that in one case it did not have the effect it is claimed it ought to have had, would that settle it? Why, no; there would come other trials of numerous people who had tried the medicine with beneficial effect to prove on the other hand that this was a good medicine.

Mr. Heyburn: I think the senator has precluded that interpretation or conclusion by the statement that it is a standard medicine. That presupposes that it is that which would be equivalent to a uniform quality; and if a standard medicine, with a standard name, of standard quality was once pronounced illegal, I think that would settle it.

Mr. Hemenway: What is a standard medicine? Who fixes the standard?

Mr. Heyburn: The maker; and if it does not conform to the standard he places on the bottle, then under the provisions of this law it is held to be misbranding.

Mr. Hemenway: Under what rule can any maker of a medicine fix the standard other than to state the truth about it?

Mr. Heyburn: Let me say to the Senator that this very medicine—Clyco Thymoline—under analysis here

has shown to be of every possible grade of impurity, from the merest imposture and imitation up to the pure article. Innumerable analysis have been made by chemists of this city.

Mr. Hemenway: May I be permitted to state that a distinguished physician in the Senate tells me that in his family it has been used for years and is being used now; and the distinguished Senator from Idaho tells me that it is a very bad medicine.

Mr. Heyburn: I think that is hardly a fair statement. I did not say it was a very bad medicine. I say the analysis which we have had made have disclosed the fact that there is a great deal of fraudulent and bogus medicine under this name upon the market.

Mr. Hemenway: No, the Senator did not put it that way. He said this medicine had been analyzed and found to be of all degrees of impurity.

Mr. Heyburn: Yes, if the Senator puts it that way, I think that is correct.

Mr. Hemenway: I say in return the Senator from New Hampshire (Mr. Gallinger), a distinguished physician, advises me that it is being used in his family and has been used for years and is being used now. That can not but result on this bill, unless my amendment goes on, that we shall have constant discussion through the courts to whether or not the particular remedy will cure the particular disease.

Now, take No. 77, I believe, the sugar pills that we get. They say they will cure grippe. They will cure

grippe in many cases. In other cases they do not cure it. Then in the case where they do not cure it the gentleman goes to the courts and proves that this medicine does not cure grippe and it becomes contraband.

That is a condition of affairs which ought not be brought about by this bill. When we reach the evil by making them state fairly and honestly and truthfully what their medicine contains—that is, the existence or non-existence or the amount of purity of any ingredient or substance—and make them state it truthfully, have we not gone far enough without allowing them to go to the courts to determine whether or not a particular medicine will cure a particular disease?

Mr. Heyburn: This amendment does not require them to state anything affirmatively. It says "if they state it."

Mr. Hemenway: And the Senator's bill does not require it. It says, "if the package containing it, or its label, shall bear any statement regarding the ingredients or the substances." That is the Senator's bill. I follow his language exactly, except that I strike out the words "ingredients or the substances" and add "existence or non-existence or the amount or purity of any ingredient or substance." I follow the Senator's own language. I see no reason why the amendment I have offered should not be accepted by the Senator from Idaho.

Mr. McCumber: If the Senator from Idaho will yield to me for just a moment, I am a little inclined to think the Senator from Indiana has not given this lan-

guage the construction that would be given to it by a court, and therefore that his argument does not apply, at least that is not the construction I myself have given to it. I want it read again:

If the package containing it, or its label, shall bear any statement regarding the ingredients or the substances contained therein, which statement shall be false or misleading in any particular.

Now, the Senator construes it as though it should read:

If the package containing it, or its label, shall bear any statement regarding the character or curative qualities of the ingredients or substance, that would make an entirely different section.

Mr. Hemenway: If the Senator will permit me, I take the construction placed upon it by the chairman of the committee. I myself can hardly put that construction upon the language, but I take the construction placed upon it by the chairman of the committee in his replies on pages 97 and 98 of the hearings.

Mr. McCumber: Sometimes it so happens that when a matter comes up hurriedly before even a chairman of a committee, and somebody has put a certain construction on it, he is liable, possibly to fall in with that construction and assume that it is right. After all, we have got to get right back to those words and give them a construction, and it does not depend upon what the Senate committee thinks.

I think that it is aimed only at the ingredients or

substances. In other words, if there is a statement upon the bottle or package that the article contains such and such ingredients, as is often the case, then it shall be deemed to be misbranded or adulterated if it does not contain those ingredients or substances. I was reading a short time ago an analysis made by the State of Massachusetts.

Mr. Hemenway: If the Senator will yield, I will say that I seek exactly the same result. What I want is that they shall be prosecuted if they fail to state truthfully the ingredients in the bottle or package. But what I seek to avoid is going to the courts to prove the curative powers of certain medicines. The world will never agree as to the curative powers of medicines.

Mr. McCumber: But the Senator will find that his amendment goes a great deal further than he intends it should go; that by its negative character it opens wide the gate to all characters of abuses and fraud. That is the main objection to it.

But getting back to the provisions, I say my construction is that it is aimed only at the contents. As I was about to state to the Senator before he interrupted me, I have lately read report No. 34, of two years ago, of the Commonwealth of Massachusetts, in which they go over a large list of medicines where the bottle or container states that it is composed of such and such drugs, of known curative qualities, when, as a matter of fact, there is not a trace of any such drug in the bottle or container. That provision is intended to strike at just such

cases as that. I confess myself that if it is not sufficiently clear, I for one am willing to more clearly define its intent.

I take the same letter which the Senator received, and which he was kind enough to hand me a short time ago, and I call attention to the construction that is placed by the writer of that letter. He says:

The slight change of phraseology proposed by your amendment makes the definition of the term "misbranded" more specific, and excludes the implication that statements made in good faith regarding the therapeutic qualities of medicine or its ingredients can be made the basis for denying the right to transport such drugs from state to state.

Now, that is not intended in my opinion to refer at all to the natural inclination of a manufacturer to blow his goods and to a considerable extent, but he simply shall not state that they contain things which they do not contain. Further on in this letter the writer, I think, falls into an error when he says:

I have a very good illustration right here in my hand. Here is a bottle marked "Depto Mangan."

Mr. Hemenway: He quotes the language.

Mr. McCumber: I understand that. It says:

"Does not affect the teeth." There is a statement as to the truth of which the purchaser is entitled to know. This bill provides that if that statement is untrue it shall be a contraband article. What objection is there to it, supposing it does affect the teeth?

Well, I think there would be serious objection if he makes a false statement even as to its qualities or what effect a certain drug will or will not have. If a person has delicate teeth, and does not want to use something as a tooth wash that will affect them I do not know that any manufacturer has a right to place upon the bottle a statement that it will not affect the teeth when as a matter of fact it will. But I do not believe that is the intent of the provision in that particular article.

Now, what would be the bad result of the Senator's amendment? He proposes to strike out the words "ingredients or the substances," so that we immediately, by striking out those words, affirmatively give authority to make the false statement with reference to the ingredients or substances, but not with reference to the existence or non-existence or the amount or purity of any ingredient or substance. In other words, if you strike that out he may say this article contains pepsin, when as a matter of fact it contains no trace of pepsin.

Mr. Hemenway: If the Senator will permit me, I thing he is unwittingly misstating my amendment.

Mr. McCumber: If I am I want to be corrected.

Mr. Hemenway: I wish to call the attention of the Senator to the bill as now drawn without the amendment.

If the package containing it, or its label, shall bear any statement——

That is not a part of my amendment. It is a part of the original bill.

Mr. McCumber: Certainly.

Mr. Hemenway: That leaves them free to make a statement or not, just as they like. So there can be no construction put upon the amendment I offered other than changing the words "ingredients or the substances" to these words: "existence or non-existence or the amount or purity of any ingredient or substance."

I want to say right now I am trying to arrive at the result the Senator seems to be trying to arrive at. I wish to guard in every way the purity of medicines. I wish to put every provision we can put into this bill to guard the people against impure medicines. All I seek to avoid is the right of some one to go to the courts and say because this medicine has not cured in one case, where it might have cured in a hundred others, it shall be contraband and shall not be the subject of interstate commerce. That is what I am trying to avoid, and the only thing I am trying to avoid, by my amendment.

If the Senator, who is much more familiar with this matter than I am and seems to be in harmony with me on the question, can suggest an amendment that is better worded to bring about that result, I would be glad to have him suggest it, because that is the sole thing I seek to accomplish. I want to have the medicine protected in every particular, every safeguard thrown around it to prevent the people from being misled or misinformed by any label or representation upon the bottle or package, but simply to prevent getting into the courts to determine the curative powers of certain medicines.

Mr. McCumber: I think I thoroughly understand the position of the Senator from Indiana; but the point I wish to make with him is that I am perfectly willing, so far as I am concerned, to stand upon the simple proposition, and that only, that the manufacturer shall not state that a bottle or package contains a thing which it does not contain, and if he makes any false statement as to the contents, which means "the ingredients or the substances," then it shall be prohibited.

Mr. Hemenway: That is exactly what I want.

Mr. McCumber: But I do not want to go further than that and open up the field and say that he can, however, manufacture this character of goods and simply be prohibited from stating the existence or non-existence or the amount or purity of any ingredient or substance. I want to leave that just exactly as it is. I do not care how much he blows his own goods provided he does not make a false statement. In other words, I do not want by affirmative legislation to give authority to the manufacturer to falsely blow his goods, and the Senator gives an affirmative authority by this provision.

Mr. Hemenway: Will the Senator point out in what particular? Here is a straight provision:

If the package containing it, or its label, shall bear any statement regarding the existence or non-existence or the amount of purity of any ingredient or substance contained in any particular——

It is a straight, equare provision, that he shall suffer the penalties of this bill if he does in any manner, shape or form make a false statement.

Mr. Hemenway: I do not see how the Senator can see where this provision changes the bill in the slightest except by taking the construction of the chairman of the committee upon the language of the bill. His construction is that they can go to the courts to determine the curative powers of a medicine.

Mr. McCumber: I do not want the Senator to state that as my construction.

Mr. Hemenway: I am referring to the Senator in charge of the bill. I refer to the Senator from Idaho (Mr. Heyburn). That is not the construction, then, of the Senator from North Dakota?

Mr. McCumber: It is not.

Mr. Hemenway: May I ask the Senator from Idaho if that is his construction of the bill?

Mr. Heyburn: I will ask the Senator to kindly restate his question.

Mr. Hemenway: That under the provisions of the bill, if my amendment is not adopted——

Mr. McCumber: I assume it is not as sufficiently clear, possibly as it should be, but I do not think that the quality or character of the ingredients is intended to be affected by a refusal or a neglect to state what the ingredients are.

Mr. Hemenway: I ask the Senator from Idaho if he construes the original bill to mean that they can go to the courts and have the court determine the curative powers of these medicines, as to whether or not they will cure headache, as to whether or not they will cure a stomach trouble, and so forth?

Mr. Heyburn: That question may be too general to be answered as a question involved in the consideration of this bill. The court may determine exactly what the bill delegates to it for determination, and that is whether or not the package containing the drug or its label, "shall bear any statement regarding the ingredients or the substances contained therein, which statement shall be false or misleading in any particular." That is what the court may determine.

And it is not a fair test of the construction to be placed upon the language either by the chairman of the committee or by the court to inquire whether the court may determine whether the medicine will cure a headache, because the terms of the bill are "shall bear any statement," not whether it will cure headache or not——

Shall bear any statement regarding the ingredients or the substances contained therein, which statement shall be false or misleading in any particular.

Now, what constitutes a false or misleading statement is a question for the court to determine, and after it has determined what constitutes such a statement, then it may say upon the testimony, Is the party guilty or not guilty?

Mr. Hemenway: The Senator has had long experience and has no doubt given to the bill very careful consideration. It strikes me that after the consideration the Senator has given to it he could be able to construe his own bill and be able to answer a simple question as to whether or not he construes the bill to mean that in

the case of, say, No. 77, of the homeopathic medicines, which is advertised to cure grippe, under the provisions of this bill they may go into court and have the courts determine the question as to whether or not No. 77 does cure grippe, on the complaint of some man that it did not cure him.

Mr. Heyburn: Mr. President, I do not feel that I can be called upon to go further than the bill goes.

Mr. Hemenway: If the Senator will permit me——

Mr. Heyburn: The argument advanced by the Senator——

Mr. Hemenway: Some of us seem to be so unfortunate that we can not understand just what the bill proposes that we are trying to find out from the Senator who drafted it.

Mr. Heyburn: Yes, it is the object of this discussion to learn from each other as to the intent and scope and purpose of the bill. So we are within the legitimate purposes of the discussion of this measure.

I fully answer the question of the Senator when I say that the function of the court will be to determine whether there is a statement upon the package or label "regarding the ingredients or the substances contained therein, which statement shall be false or misleading in any particular." That is the function of the court. If it is called upon to deal with this question, necessarily the court must determine that just as it instructs a jury as to what constitutes larceny or murder or any other

crime that is being considered. The court instructs the jury as to what constitutes those offenses and then says to the jury: "It is your function now, being instructed as to what constitutes the offense, to determine whether or not under the facts which have been adduced in your presence this party is guilty or not guilty." I see no more difficulty in applying and interpreting this law than in applying any other criminal law. I think that fully answers the Senator's question.

Mr. Hemenway: The Senator has not yet answered my direct question as to whether or not the case I state could be determined in the courts. Now, that is all I seek to avoid. I want every protection given to the people that can possibly be given to them against buying something under a false pretense or under a false representation; but I do not want to have a continuous trial in the courts to determine questions that the medical fraternity themselves can not determine. They have been trying for years to determine whether this, that or the other medicine will cure a certain specific disease, and they have not yet determined it. All I want is to have such legislation as will give the people pure drugs, pure medicines, and protect them against being misinformed and misled by statements printed upon a bottle or box or from being misled in any other way by men who have medicines to sell; but I certainly do not want to have the people of the country put into the courts to determine the difference between the opinions of physicians all over the country as to whether or not this or that medicine has certain curative powers.

Mr. Heyburn: Mr. President, I would be glad to have the Senator's opinion as to what questions the courts would determine, under the language of this bill, in his judgment. He is a lawyer of long experience, and I should like to know.

Mr. Hemenway: Judging from the construction put upon it by the Senator——

Mr. Heyburn: I should like to have the Senator's judgment and not a deduction drawn from the judgment of another.

Mr. Hemenway: Candidly I will say to the Senator that I do not believe, under the bill as drawn by the Senator, the courts could determine the curative powers of medicines; and the only reason for my amendment is because the Senator, who is a lawyer of distinction and whose ability is well known not only in the Senate, but all over the United States, has put a different construction upon the language of the bill.

Mr. Heyburn: I will ask the Senator where I have placed a different construction upon the bill?

Mr. Hemenway: In the hearings.

Mr. Heyburn: I should like to have a reference.

Mr. Hemenway: On pages 97 and 98 of the hearings.

Mr. Heyburn: I want to see just what precedes it.

Mr. Hemenway: Unless I misconstrue the language of the Senator——

Mr. McCumber: Mr. President, if the Senator from Indiana wishes to make the bill absolutely certain

to have his construction, it could be done by striking out the word "regarding" and inserting the words "as to its constituent;" so as to read:

If the package containing, it or its label, shall bear any statement as to its constituent ingredients or substances contained therein.

That change can be made if there is any question about it. I will frankly say that that has been the construction I have placed upon it, and I never thought of it in any other light. The Senator from Indiana agrees with me.

Mr. Hemenway: I think the Senator has worded it better than I have done.

Mr. Gallinger: Mr. President, I simply rose to suggest that I think the Senator from North Dakota has solved the difficulty we have been struggling with. The Senator from Indiana, *sotto voce*, consulted me as to the two remedies mentioned in the testimony—Pepto Mangan and Glyco Thymoline. I said to the Senator that I knew nothing about Pepto Mangan, but I presumed there was some iron, because it says on the label it will not affect the teeth injuriously.

It is pretty difficult to know whether a remedy will cure or kill. If doctors were required to do what the Senator from Idaho suggested these remedies ought to be required to do, the medical profession would have a hard time of it. Patients have idiosyncrasies. One man can take a dose of strychnine in a very large quantity, while the thousandth part of a grain of strychnine would

throw another man in convulsions. I have known just such cases. So we can not hold physicians up to the standard of always knowing what a remedy will do when it is administered.

So in reference to one of these advertised remedies. It might not affect the teeth in a thousand persons, and it might injuriously affect the teeth in another person who has the peculiar idiosyncrasy or whose teeth were composed of somewhat different materials from what they ought to be.

As to Glyco Thymoline it is a remedy that is used in families for sore throats and that class of cases, and I have never heard it called in question as being made of impure material. It may be that there are some fraudulent imitations of it on the market.

The Senator was unfortunate. This controversy arose from what I think was an ill-considered observation on the part of the Senator from Idaho during the hearing, in which he said, as to Pepto Mangan, if it says it would not affect the teeth, and if it did affect the teeth it would be contraband—that is, if it affected the teeth of one person it might be ruled out as an article of commerce. So with Glyco Thymoline, the Senator suggested that if the statement on the package or the bottle was not found to be true—he did not say by whom, presumably by one person——

Mr. Heyburn: No, by the courts.

Mr. Gallinger: That would likewise be contraband. The Senator, I think, in those suggestions went a little be-

yond what he intended. I think the Senator from Idaho and the Senator from Indiana are aiming at precisely the same thing. I feel sure that the suggested amendment on the part of the Senator from North Dakota will cure the entire difficulty and I hope the Senator from Idaho will accept it, and we shall get through with this discussion.

Mr. Heyburn: I should not like, Mr. President, to indicate what occurred before the committee. We differ, of course, as to our conclusion very often as to what should and what should not be incorporated in the law. I perhaps go further—doubtless I do—than the Senator from New Hampshire in regard to what the law should provide and what protection should be thrown about the people. I do not believe that any medicine that professes to be free from injurious properties to any organ of the body should be sold under an advertisement that it is free from such injurious effects unless it is really so. The Senator from New Hampshire makes more allowance for the differences of physical conditions and circumstances than I do. I think that it is a question merely as to what interpretation I would put upon the law or what interpretation the Senator from New Hampshire or the Senator from Indiana would put upon the law. Were I sitting as a judge in this case I would perhaps hold these people to a stricter rule of responsibility and accountability than would the Senator from New Hampshire or the Senator from Indiana.

The suggested solution of interpolating the word

"constituent" before the word "ingredient" is an innocent and harmless one. "Ingredient" and "constituent elements" are synonymous terms; they mean one and the same thing, and I should have no objection to using the word twice or in two sentences. I assume if the word "constituent" is interpolated before the word "ingredient" that the Senator from Indiana would withdraw the balance of his amendment. I certainly would not object to it, because if the word "ingredient" is a strong word, then "constituent ingredient" is a stronger term.

Mr. Hemenway: I withdraw my amendment if the insertion of that word cures what I am trying to cure, as I understand the Senator from Idaho to think I have misconstrued his statement in the hearings. My own construction of this language would not allow the court to determine the curative powers of a medicine; but certainly now and not in the court, this question ought to be determined. We have too much legislation that is uncertain and misleading, and where the courts are compelled to determine what Congress intended. In legislating we ought so to legislate that there would be no trouble in determining what Congress intended. That is what I am driving at now—to secure such legislation here as to leave the question not in doubt as to whether or not the courts can determine as to the curative powers of medicines. I want them to have full power to determine as to the purity and as to the fact whether or not any article is misrepresented by the label on a bottle or a representation of the ingredients, etc. I think the amendment pro-

posed by the Senator from North Dakota covers the point.

Mr. Heyburn: That embodies withdrawing the balance of your amendment?

Mr. Hemenway: I withdraw it temporarily. I am going to look into the matter, however, and if I make up my mind that it does not cure the evil, I shall, of course, reserve the right to urge my amendment hereafter.

The Vice-President: The amendment proposed by the Senator from North Dakota (Mr. McCumber) will be stated at the desk.

The Secretary: On page 7, line 11, after the word "statement," it is proposed to strike out "regarding the," and to insert "as to its constituent;" so that if amended the clause will read:

Second. If the package containing it, or its label, shall bear any statement as to its constituent ingredients or the substances contained therein.

Mr. Hemenway: That is right.

Mr. Heyburn: I have no right to accept the amendment at this time.

The Vice-President: The amendment will be ordered to be printed and will lie upon the table.

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NUMBER 433.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1910.

UNITED STATES, PLAINTIFF IN ERROR,

VS.

O. A. JOHNSON, DEFENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT FOR THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

ADDITIONAL BRIEF ON BEHALF OF O. A. JOHNSON, DEFENDANT IN ERROR.

JAMES H. HARKLESS,
CHARLES S. CRYSLER,
CLIFFORD HISTED,
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At the time of the filing of the original brief on behalf of the defendant in error we were not favored with any brief on behalf of the United States, the plaintiff in error, and hence, had no opportunity to answer, therefore we submit this as an additional brief on behalf of the defendant in error, Dr. O. A. Johnson.

I.

The government in its brief suggests that they assume that it is conceded that the acts charged in the indictment fall within the letter of the statute, and that the only question for discussion is as to whether the acts charged in the indictment are to be restrained by construction to exclude the matters therein set up. Our answer is that we do not concede any such a proposition. Our propositions are that:

1. The acts charged in the indictment do not fall even within the fair letter of the statute; and

2. That even conceding that they do that they must be restrained by construction and confined to the purposes concerning which the Act of Congress was directed.

While we have argued this question at length in our original brief and do not desire to again enter into any extensive argument of it, as we feel we can add but little to it, we may again be permitted to suggest that when Section 8 is properly read the claimed offense does not fall within even the letter of the statute: Section 8 reads as follows:

> "Sec. 8. That the term 'misbranded' as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design or device regarding such article or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the state, territory or country in which it is manufactured or produced."

We again suggest that inasmuch as in this section two subjects and articles were being dealt with, to-wit, "drugs, and articles of food," that when fairly read by its letter as applied to drugs it would read as follows:

> "Sec. 8. That the term 'misbranded' as used herein shall apply to all drugs * * * the package or label of which shall bear any statement, design or device regarding * * * ingredient or substance contained therein which shall be false or misleading in any particular and * * * to any drug, product which is falsely branded as to the state, territory or country in which it is manufactured or produced."

When read in this sense and as applied to the subject under consideration it is clear to us that the claimed offense set up in the indictment does not fall within the letter of the statute.

The government's brief attempts to answer this construction and reading of the statute, as last set forth in our brief, but it appears to us that this answer is labored and unfairly reasoned. They argue that such a construction would render the section wholly inapplicable as to drugs. But upon a careful analysis of the section and its fair reading it seems apparent that our contention in this behalf is unassailable.

II.

But, in the view we take of the act, and its construction and the view taken of it by the lower court, even if we concede that Section 8 can be considered by its letter broad enough to cover the claimed charge in the indictment, then by a fair construction and rea-

sonable intendment it cannot be enlarged so as to cover, or be intended to be leveled against, the right of a physician to give an opinion as to the curative properties of his medicines. We will not here, however, again undertake to argue this question. Our original brief has covered this question, and we shall be content at leaving the subject where the original brief leaves it.

III.

But in this case we are met in the brief by the government with a remarkable situation which we had not supposed had heretofore obtained in practice in the Supreme Court of the United States. If this court is to decide the question upon its merits rather than upon the indictment, and as if the facts were to be tried in this court, we still had not supposed that magazine articles copied and quoted from Collier's Weekly, The Ladies Home Journal, and other like prejudiced newspaper articles, doubtless inspired by the campaign of one of the gigantic monopolies of the country, to-wit, the American Medical Association, made up of the allopath profession of the Union, were to be considered. The fact that the government has seen fit to enter the field of magazine discussion and to attempt to try the case upon its merits, founded upon magazine articles is our excuse for entering that discussion in this court. As a basis for this attack in the government's brief they open the comic drama with the following statement:

> "This very point was expressly stated in the public campaign which went on contemporaneously with the passage of the bill through Congress. For instance, in its issue of January 13, 1906, Collier's Weekly said:

> Other (of the patent consumption cures) are comparatively harmless in themselves, but by their fervent promises of rescue they delude the sufferer into misplacing his reliance and forfeiting his only chance by neglecting those rigidly careful habits of life which alone can cure the 'white plague' one and all the men who advertise medicines to cure consumption deliberately traffic in human life.
>
> The present case affords an even clearer illustration of the relation between these cure-all labels and the public health. *The only cure for cancer as yet discovered by any man (excepting 'Dr.' O. A. Johnson, is surgical intervention, and that can save the patient only if availed of at the very inception of the disease.* What is the object of Dr. Johnson's beguiling labels stating that the contents of his bottles will destroy and remove cancer? Is it not to induce the victims of cancer to rely upon the labels, and to use the 'remedy?' And do not the labels depend upon and encourage the weak human impulse of the victim to conceal the disease from his physician and his friends and nurse it in secret? Meanwhile the cancer is permitted to spread beyond the possibility of cure."

This is certainly an unusual and strange contention to be urged here upon a demurrer to an indictment, and is an attempt to evade the question of law, presented by the demurrer, by presenting a consideration of magazine articles, and injecting the opinion of the writer of the brief as to what he considers is the proper way of treating disease. But even if it was a subject of discussion here the first answer to the statement is that it is not true, and the second is that counsel for the government has certainly not read the medical authorities emanating from the allopathic school itself, whose exclusive theory he is evidently attempting to state, and to

state it untruly from their own authoritative standpoint.

The government's brief asserts that the only cure for cancer yet discovered by any man is *surgical intervention* and that can save the patient only if availed of at the very inception of the disease." This statement might have been warranted one hundred years ago when the ignorance of allopathy (the old line profession) was slumbering in the musty vaults of dogma, and to which it would yet confine all modern discovery in aid of the profit producing knife, if it were not for the fact, that even the allopathic modern writers of medical works are shaking the knife from their hands. The assertion of the government's counsel that cancer cannot be cured except by surgical intervention, we shall assume was made without any reading of medical authorities upon the question, and it can only be excused upon the theory that the opinion of some allopathic prejudiced member of the American Medical Association, wise in his own conceit, has been the informer, and upon whose statement the assertion has evidently been made. We could scarcely conceive that the able counsel who wrote this brief, possessing the legal learning displayed therein, could have reached such legal attainment, and at the same time have had ample opportunity to have himself become proficient in the medical profession, justifying his declaration as a medical man that cancer cannot be cured except by surgical intervention.

A brief reference to the standard medical authorities of the country shows the contrary to be true. Even the allopathic modern medical authorities admit that

cancer is being cured, and recognize at least four distinct character of treatments, to-wit:

1. Excision (the knife).
2. Electroylsis (electricity).
3. Caustics (eschorotics).
4. Exposure to X-Rays.

The system practiced by the defendant in this case is that known as the caustic system. A reference to the standard medical authorities upon this question will dispel all of the assertions made by the counsel in their brief touching upon this subject. One of the standard writers upon dermatology, and one of the favorite text books of the allopathic, or old school physicians, is William Allen Pusey, Professor of Dermatology in the University of Illinois, and dermatologist of St. Luke's and Cook County Hospitals of Chicago; and a member of the American Dermatological Association. In his recent book just issued, 1911, commencing on page 912 and following in treating this subject of epithelioma (skin cancer), he says:

> "*Prognosis.*—The successful treatment of epithelioma involves the complete destruction of the carcinomatous tissue. The prognosis, therefore, varies accordingly to the prospects for complete removal which are presented by any lesion. Epitheliomata which are confined to the skin *can usually be cured.* If they have involved bony structures the prospect of cure is less, and if there are glandular matastases the prospect is still less. Lesions, therefore, at the muco-cutaneous junctures and on the mucous membranes are the most unfavorable, because of the great danger of metastasis; while lesions upon the skin not closely in relation with

lymphatic nodes offer the best prospect of radical cure. The rapidity of growth of a lesion is a factor of some importance. Rapidly growing lesions are less promising than indolent lesions, although rapidly growing lesions, if they can be gotten before metastases has occurred *can usually be cured*. The depth also of the primary mass is a factor in the prognosis. If the mass is deep in the skin it is less promising of relief, both because the danger of metastases is greater and the rate of growth is more rapid.

Treatment.—The only radical treatment of epithelioma is complete destruction, and it is a principle applicable in all cases that irritating measures that do not cause complete destruction of the epitheliomatous tissue should not be employed. For that reason it is bad practice to apply superficial caustics like nitrate of silver or carbolic acid or corrosive sublimate. The irritation which they produce simply increases the blood supply and stimulates the growth of the tumor.

If an epithelioma is ulcerating it should be kept clean and dressed with bland application according to the usual practice in treating ulcers. The best dressings for epitheliomata are wet dressings made with a non-irritating antiseptic or sterile solution, of which boric-acid solution is as good as any.

The radical treatment of epithelioma may be carried out by *various destructive procedures*, of which the ones usually employed are excision, curetting, electrolysis, the application of *caustics*, and exposures to X-rays.

Removal of epithelioma by excision is the method usually employed by *surgeons*, and it is the only method which is justifiable in cases which demand removal of the contiguous lymphatic glands at the same time with the epitheliomata. This principle applies especially to deep-seated epitheliomata of the lip, and no case of epitheliomata of the lip

should be treated by any other method than radical excision if removal of the lymphatics beneath the jaw is indicated and feasible. Aside from cases of this sort, excision is in my opinion *not as good a method* of treating epitheliomata upon the surface of the skin as either the application of X-rays or of *caustics*. The objection to excision of epitheliomata is that the outlying radicals of the tumor extend well beyond the apparent border of the growth, and their removal by excision requires the sacrifice of a great amount of healthy tissue. The deformity which results is therefore greater. But a more important objection is that even the most careful surgeon is apt to fail to get all traces of the growth, so that recurrence is common. From a large experience in epitheliomata, I am convinced that the danger of recurrence is greater in epitheliomata after excision than after removal by X-rays *or caustics*. Let me emphasize that I am speaking only of epitheliomata of the skin, and not of those on the mucous membranes or where removal of glands at the primary operation is indicated. In such cases I believe operation followed by X-rays is the ideal procedure.

In the treatment of epitheliomata by excision the lines of excision should extend well beyond the borders of the growth, at least a quarter of an inch or more beyond the apparently involved area, and care should be taken not to cut through the tumor tissue in making the dissection; otherwise particles of epitheliomata are liable to be transplanted by the knife to healthy tissues and later show as recurrences.

Simple curetting is not a satisfactory method of treating epitheliomata, because all of the epitheliomatous tissue cannot be destroyed in this way; but combined with the subsequent *use of caustics* it is a good quick method of treating small lesions. The friable epitheliomatous tissue breaks down readily under the curette, and microscopic epitheliomatous

masses can readily be scooped out. If this is done, the base should then be thoroughly cauterized with a strong caustic like a saturated solution of caustic potash or zinc chloride. This serves the double purpose of destroying chemically most of the remaining epitheliomatous tissue, and of producing a violent inflammatory reaction which will destroy any isolated cells. The procedure is rendered painless by the injection of a few drops of a two-per-cent or four-per-cent solution of cocaine or eucaine. Afterwards the lesion should be dressed with non-irritating wet dressings until the slough separates and the ulcer heals. Care should be taken to prevent the accumulation of pus crusts. Indeed, in the treatment of all epitheliomata one should never trust to healing under crusts, where the character of the granulations cannot be seen.

Small epitheliomata can be destroyed by electrolysis, which is simply a method of *cauterization by caustics* produced around the needle by electrical decomposition. The amount of destruction, however, produced around the needle is small and the method is not safe unless great care is taken to destroy the tissues thoroughly and widely. It is not a radical method, and is not in my opinion to be commended.

The use of caustics, especially of caustic pastes, is not generally looked upon with favor. The reason for this I believe lies largely in the facts, first, that it is different from ordinary surgical procedures, and second, that it is used and exploited to a great extent by irregular practitioners.

The method has been advocated in this country notably by Robinson, *and my experience with it enables me to indorse it fully.* Like any other method of treatment it must be radical to be successful, and must be properly carried out. The great advantage of the *use of caustics* is that they produce a zone of violent inflammation around the mass which they destroy, so that they destroy not

only the epitheliomatous tissue actually cauterized, but, through the inflammatory process excited, also outlying masses which have not been actually reached by the caustic.

In the use of a caustic, the application should be made vigorously enough to destroy immediately the tumor tissue which is apparent. The only exception to this is in the treatment of very large lesions, which have to be destroyed piecemeal by repeated treatments. Suppose, for example, we have an epithelioma the size of a ten-cent piece. The caustic should be so applied as to completely destroy the evident tumor. If this is done inflammatory reaction may be relied upon to destroy the outlying radicals of the growth. If the lesion which we have assumed is a nodular lesion which is not ulcerating, it may be better to curette out the larger part of the mass and then apply the caustic. If it is an ulcerating lesion, the curette may be omitted and the tumor directly *destroyed by the caustic*. In small lesions of this sort caustic potash or chloride of zinc may be directly applied. They are most conveniently applied when they have been liquified by the addition of just enough water to convert them into a sirupy liquid. The application can then be made either on a glass rod or a cotton swab. Both of these caustics liquify the tissues rapidly, and the destruction extends beyond the apparent limits so that as soon as the entire tumor mass has been destroyed * * * the action of the caustic should be stopped by washing the surface with water. The eschar formed should be treated in the same way as already suggested in considering curettement.

An equally satisfactory method of treating these small lesions, and a more satisfactory method for larger lesions, is by the use of *caustic paste*. Of these the two most satisfactory pastes are Marsden's arsenious-acid paste and Bougard's chloride-of-zinc paste. In my experience both give equally

satisfactory results. Marsden's paste consists of powdered acacia 1 part and arsenious acid 1 or 2 parts by weight, which are mixed at the time they are to be used with enough water to make a paste of the consistence of a firm ointment. If deep destruction of the tissue is necessary it is better to use the stronger mixture. If the lesion is relatively shallow in comparison with its area, the mixture of equal parts of arsenious acid and acacia are sufficient. In ulcerating lesions the stronger paste is preferable, because the eschar is formed more quickly and limits the absorption of arsenic. The paste is applied in a thick layer over the area to be destroyed, and should extend beyond the apparent border of diseased tissue. It should be left in position until a white eschar is produced; this requires from eight to twenty-four hours. If upon the removal of the paste it is found that part of the tumor has not been destroyed, it should be reapplied immediately to destroy the remaining portion. After the eschar forms it should be dressed surgically. Robinson says that no care should be taken to dress the wound antiseptically, as suppuration increases the inflammatory process and renders it more destructive to remaining carcinomatous cells, but I have found no disadvantage in keeping the wounds clean. The slough will separate in from five to seven days, and if the treatment is properly carried out there remains a healthy granulating wound which heals in about a week and leaves a relatively small scar. The formula for Bougard's paste is:

Prescription: Farinae triturate (wheat flour), amyli, each one-half ounce; pulverized arsenious acid eight grains; hydrag. sulph., rub two drams; ammon. chloridi, two drams; hydrarg. bichlor. corros., four grains; zinci chlorid. cryst., one ounce; aquae fervid, one-half ounce.

The first six of these are separately powdered and then mixed together. The zinc chloride is dis-

solved in the boiling water, and this solution is added slowly to the other ingredients with constant stirring to prevent lumping. The resulting paste is firm and rather stiff. It has the advantage over Marsden's paste that if put in a tight jar to prevent evaporation it may be kept indefinitely. It is used in the same way as Marsden's paste.

Bougard's paste is slightly more destructive to normal tissue than arsenious-acid paste, but its application is less painful, and on the whole in my experience is the preferable paste, although Robinson prefers Marsden's. The application of Bougard's paste is rendered almost painless if five to ten per cent of eucaine is added to the water with which the paste is mixed. To Marsden's Robinson adds ten to twenty per cent of cocaine or eucaine.

In order to avoid all risk of arsenical poisoning, one should not use Marsden's paste over more than a square inch of surface at one time. Bougard's paste can safely be used over a larger area, but in order to keep perfect control of the destructive process it is better not to use it over more than a square inch of surface at one time. Much larger areas can be treated successfully by successive applications from day to day over different parts of the lesions. With both Marsden's and Bougard's paste, if the epidermis is unbroken it should be removed with caustic potash solution, as the pastes will not act through the horny epidermis.

The application of X-rays in the treatment of epithelioma depends upon the fact that by X-rays one is able to cause degeneration and ultimate destruction of carcinoma cells, while there is produced in the connective-tissue stroma only a proliferative inflammatory process which results in the formation of healthy scar tissue.

In the treatment of epithelioma with X-rays the surrounding surfaces should be protected by a lead mask at least one-fiftieth of an inch thick, in which a hole is made corresponding to the area to be ex-

posed. This should be large enough to allow the exposure of the apparently healthy skin for about a quarter of an inch beyond the border. The first aim in giving the exposures should be to produce a moderate X-ray reaction. To this end exposures should be given at intervals of from one to three or four days, and should be continued until involution of the tumor begins. In many cases this begins before any evidence of X-ray effect upon the skin occurs. Frequently epitheliomata entirely disappears and are replaced by healthy scars without the production of any manifest effect upon the skin. Usually it is necessary to carry the exposures to the point of producing a moderate erythema. Only rarely is it necessary to push the exposures to the point of producing a vigorous dermatitis in order to get involution of the tumor. In my practice I give exposures of from five to fifteen minutes' duration with the wall of the tube at a distance of from two to six inches from the lesion, and repeat these exposures from two to six times weekly. With such frequent and close exposures a relatively small amount of X-rays should be used, just enough to cause a yellowish-green glow in the tube.

If stronger exposures are given they should be correspondingly shortened in time, or given less frequently. In cases where there are unusual reasons for haste, as, for instance, with deep rapidly growing epitheliomata, I push the treatment from the start, and produce a dermatitis quickly. But, except under these conditions, it is better, in my opinion, to treat lesions more slowly and obtain the results gradually. In this way all risk of troublesome burns can be avoided, and in nearly all cases successful results can be attained. To carry out the treatment from the beginning until a healthy scar is obtained usually requires from three to ten weeks. In many cases the involution of the tumor can be started by from four to six exposures, or less if they are given vigorously. When involution begins

or X-ray erythema appears, the exposures are stopped, and, as a rule, it requires from two to three weeks for the lesion to entirely disappear. Occasionally it is necessary to repeat the treatment.

The chief advantage of the treatment of epitheliomata by X-rays is that the agent can be made to destroy diseased tissues without destroying the healthy connective tissue stroma; the method, therefore, leaves small scars, and further is applicable to many lesions which are so extensive or involve such important structures that removal is impossible. Minor advantages are that the treatment is painless and avoids more radical procedures. Roentgentherapy is also a very valuable means of retarding the growth of inoperable tumors, even where complete destruction is impossible. In my experience X-rays are applicable to all forms of epithelioma, and on account of its advantages it is the preferable method of treatment, as a rule, except in the type of cases requiring a radical operation, which have been referred to in considering treatment by excision. In my experience in the treatment of epitheliomata with X-rays, extending over six years, the results are as a rule permanent, with certainly as few recurrences take place after any other method of treatment."

It will be seen that this eminent writer recognizes and asserts that the character of disease referred to can be destroyed by these procedures. It will further be noticed that he states that excision is the method usually employed by *surgeons* and that it is the only method usually justifiable which demand the removal of the contiguous lymphatic glands at the same time that the epithelioma (cancer) is removed.

It will be further seen that the writer says, aside from cases of this sort excision is in his opinion not as

good a method as treating epitheliomata upon the surface of the skin as either the application of X-ray or of caustics. The objection to excision of epitheliomata is that the outlying radicals of the tumor extend well beyond the apparent border of the growth, and their removal by excision requires the sacrifice of a great amount of healthy tissue. And the author further says that from a large experience in epitheliomata he is convinced that the danger of recurrence is greater in epitheliomata after excision than after removal by X-rays or caustics.

The author, allopathic though he may be, recommends in a large percent of cases the use of the very system practiced by the defendant in this case, to-wit, the use of caustics. And that caustics is a better remedy than the use of the knife in certain class of cases. If it is true, that it is better, then the proposition naturally follows, that if it is improper for the defendant to use the system of caustics, which is better than the knife, then to reverse the situation, it is true that the allopath physician should be prosecuted for using the "Keen Kutter," or else it is true that they must both recognize that cancer can be cured by either method. This writer shows us clearly why it is that the surgeons of the country do not use the caustic treatment, but prefer to use the knife, and says that the knife users do not approve the caustics for the reason that it differs from the ordinary surgical procedure, and that they further do not approve it because it is used and exploited to a great extent by irregular practitioners. This eminent author, allopathic to the core, therefore lays down the proposition exactly to the

opposite of what the learned gentleman writing the brief for the Government has stated.

And again he advises us of the great advantage of the use of caustics over the knife wherein he says:

> "The great advantage of the use of caustics is that they produce a zone of violent inflammation around the mass which they destroy, so that they destroy not only the epitheliomatous tissue actually cauterized, but through the inflammatory process excited, also outlying masses which have not been actually reached by the caustic."

And in addition to this he certainly asserts that the caustic remedy cures cancer when he says:

> "The caustic should be so applied as to completely destroy the evident tumor. If this is done, inflammatory reaction may be relied upon to destroy the outlying radicals of the growth."

He then discusses the use of caustic paste, which is a part of the caustic treatment, and sets forth in his work who the distinguished physicians are, that invented it, and says that they give satisfactory results.

The author then proceeds to set forth the prescription for this caustic treatment, and indeed we may say that it is in part the medicines that the defendant uses in his caustic treatment, a part of which is described in the indictment.

He further asserts that epithelioma (skin cancer) is successfully treated by X-rays, and tells us that these treatments are permanent. When we read this author who is recognized as one of the greatest of allopathic writers upon the subject, how can counsel for the Government be justified in making the statements that they have made to the court in this brief?

Another distinguished physician of the Old Line School, commonly called "Regulars," is Dr. W. S. Gottheil, professor of dermatology at the New York Post-Graduate Medical School and Hospital, Dermatologist to the City Hospital and Lebanon Hospital and consulting Dermatologist to the Beth Israel and Washington Heights Hospitals. In the third edition of his work issued in 1907 devoted to the treatment of cancer of the skin, he has fully discussed this subject and distinctly recognizes that cancer can be cured, and among other things, on page 9 of his work says:

> "Its (cancer) appropriate treatment is a subject upon which opinions differ widely, and for which definite rules are hard to formulate. The general integument offers a specially favorable field for the study of this, as of so many other obscure affections."

This physician further advises us in his work that the treatment of cancer from the standpoint of the Dermatologist is entirely different from the standpoint of the surgeon, wherein he says (p. 11):

> "And thirdly, the most approved methods of treatment. And here the Dermatologist stands on somewhat different ground from the general surgeon, and sometimes advocates methods that might not commend themselves to him. Nevertheless, his treatment stands the test of experience, and there are definite pathological reasons for its success. Some cases of cancer are, of course, best treated by strictly surgical measures. But a very large proportion of the new growths of this nature with which the Dermatologist has to deal are better handled in other and non-operative ways. A fairly extensive experience, and the observation of a number of cases for years after their cure, enables and encourages me to speak with emphasis."

Here this eminent physician, allopathic in all of his persuasions and eminent in his profession, not only recognizes that in a large proportion of the cases non-operative methods are the best, but recognizes that cases have been cured. This author in his work proceeds to give prescriptions and manner of curing by the caustic system and by caustic paste which is adopted and practiced by the defendant, and again quoting from this author, (p. 38) of his work:

> "Again, from the patient's point of view, a cutting operation is to be avoided when possible; and when a physician is the sufferer he holds precisely the same opinion. It has been my lot to treat a number of medical men for this kind of disease and I know of no more uncompromising opponents to the knife than they. Scientifically, of course, this consideration has no weight at all; but practically it is of importance, since it is often a chief factor in deciding the patient whether or not to submit to our treatment.
>
> Finally, another consideration deserves mention here. *Cancer of the skin, as I have said, has been cured without the use of the knife, and is being so cured today.* Unfortunately most of the work of this kind is done by irregular practitioners and quacks. Even excluding all the cases of false diagnosis, the syphiloderms and warts called cancer, by dishonest or ignorant men, and excluding also the cases that are not cured at all or that relapse, a certain number of true cancers of the integument are cured by the advertising specialists. I am often asked by practitioners from all parts of the country to explain these cases, and I can readily do so. There are better methods of curing the vast majority of skin cancers than the knife, and these men know them and use them, and we do not. *It is time that this weapon was taken out of their hands and put in those of the profession at large.*

After reading from this allopathic author, what is to be said of the statements of the counsel that the only way to treat cancer is by the "Keen Kutter" process, and what is to be said of their contention that cancer cannot be cured? This quotation from this eminent surgeon is a frank confession of the motive that prompts the old knife users in cancer cases in attempting to condemn other methods. The real point is this, that because other recognized systems of cure and treatment of cancer are not by the knife that they are to be branded as "quacks" and advertising specialists, and irregular from the standpoint of the old knife users, and for that reason alone must be prohibited from practicing the well accepted method, which the allopath himself adopts. This author recognizes as an existing fact, that the parties that he is pleased to term "quacks" and advertisers not only have a better treatment, but that they are bringing about *successful cures of cancer by the caustic system* and makes frank confession that it is time the old knife cutters were recognizing the fact, and instead of superstitiously standing out against it, recommends that the allopaths adopt the system themselves.

But again, this same author, on page 42, seems to put a quietus upon the statement of the counsel made in their brief when he says:

> "For the reasons already stated surgical procedure in its stricter and more limited sense *is not the best treatment* for the great majority of skin cancers."

And again, on page 51 of his work:

"Now as to the class of cases in which it is to be used, it must not be lost sight of that we have numerous other methods of treating skin cancers at our disposal, many of *which have stood the test of time, have long given and are still giving perfect results, are quicker, cheaper, and easier, and do not require the expensive paraphernalia of the X-ray.*"

Again may we ask why it is that counsel in their brief have made the statement in reference to the cure of cancer that they have made so deliberately to this court?

Another leading allopathic writer upon the diseases of skin and the treatment of cancer is Dr. Jay Frank Schamberg, professor of Dermatology and Infectious Eruptive Diseases in the Philadelphia Polyclinic and College for Graduates in Medicine, and fellow of the College of Physicians of Philadelphia; member of the American Dermatological Association, in his work under recent date, to-wit, 1908, at page 337 says in speaking of the treatment of skin cancer:

"Most *surgeons* regard excision as the best, if not the exclusive, course to pursue.

In deep growths, in those associated with glandular enlargement, and in those situated upon the lip or some other mucous surface, there can be no question as to the wisdom of employing the knife. There are many superficial growths, however, in which it is entirely unnecessary to use such heroic treatment; not only can these Epitheliomata be cured without the use of the knife, but the resultant cosmetic effect is much better when treated by other means. The freedom from recurrence is no greater after surgical ablation than after other

treatments to be described. There are many aged and timid persons who will shrink from the use of the knife, but who will gladly submit to treatment by other means.

For small superficial growths one of the most efficacious and rapid methods of treatment is erasion with a dermal curet. This can be accomplished in a minute and almost without pain; if desired, local anesthesia by the injection of eucain may be employed. After curetting the area is cauterized with the stick of nitrate of silver; this stops bleeding and seals the wound with a coagulum."

Then he takes up the caustic system at page 338 and says:

"Caustic potash is a valuable but powerful caustic, and must be used with great care. *It readily permeates tissues both diseased and sound, and destroys more deeply than is expected.*"

He says again at the same page: That arsenic has been highly prized as a caustic and says in reference to it:

"It exerts a selective destructive effect upon diseased cells."

On the same page he gives the formula for such treatment. This distinguished allopathic physician, therefore, not only recognizes the caustic treatment adopted by the defendant in this case but expressly states that this character of *cancer is cured* without the use of a knife.

Let us call attention to another allopathic writer and one, by the way, who ranks in standard among the allopaths as Webster's spelling book to the orthography of the "puncheon floor school house day." This author is Henry W. Stelwagon, professor of Dermatology in

the Jefferson Medical College and Woman's Medical College, Philadelphia; Dermatologist to the Howard and Philadelphia Hospitals; member of the American Dermatological Association; associate member of the French Society of Dermatology and Syphilography and of the Italian Society of Dermatology and Syphilography. In his work which we now have before us, issued in 1905, at page 822 he says, speaking of carcinoma cutis (cancer of the skin):

> "The object to be kept in view in the treatment of the disease is the thorough destruction or removal of the epitheliomatous tissue. For this purpose operative measures are preferred by the surgeon while the specialist in Dermatologic practice usually favors the caustic plans. (The plan practiced by the defendant in this case.) To a great extent, I believe this difference of opinion to be due to the fact that those cases coming under our care are relatively superficial and slight, circumscribed and slow, whereas those coming to the knowledge of the surgeon are for the most part of a more serious, malignant, and extensive nature. The former do well and probably better with caustic methods, the latter with surgical measures."

This author, further on the same page, undertakes to describe his method of treatment as follows:

> "A combination of the surgical plan of thoroughly curetting the area and then following with caustic such as the application of a 50 per cent solution of zinc chlorid, or momentary cauterization with caustic potash or with several days' use of a strong pyrogallol salve to be referred to later, constitutes a successful method, applicable in many instances. This latter plan is to be commended for epitheliomata of moderate size and infiltration. For those instances, however, in which the slightest men-

tion of operative procedure is met with opposition or withdrawal, the caustic plans of treatment can be resorted to; and for the superficial skin cancers, those, as a rule, without glandular involvement, and which often come to the specialist in Dermatology I am convinced from considerable experience, that the method is not only a practicable one, *but usually permanently successful.* The effect of the caustic seems to extend beyond the escharotic action produced."

This author then proceeds to give the various remedies and ingredients of the medicines to be used in the caustic treatment:

"The favorite caustics are pyrogallol, zinc chlorid, caustic potash, and arsenious acid. After their use the subsequent treatment consists, when possible, of the continuous application of poultices until the slough (cancer or diseased tissue) comes away, and then a mild healing ointment of 1 to 2 per cent pyrogallol salve, one of equal parts of mercurial plaster and petrolatum (vaseline), or of zinc oxid. When poultices are not practicable, the healing ointment can be immediately applied after the cauterization; in such instances, however, the slough comes away much more slowly. The part is washed once or twice daily, and oftener if there is much discharge. Pyrogallol is applied in the form of a salve of 25 to 40 per cent strength, in the manner described under lupus vulgaris and continued for from one to two or three weeks, according to the character of the growth and the rapidity of action."

This author also further states:

"Zinc chlorid is a caustic formerly much in vogue for its destructive action. It is painful and destroys morbid and healthy tissue alike. Its action is peculiar in that it seems to mummify the tissue, and therefore is especially applicable to epitheliomata situated over blood vessels. It is most commonly

applied as Bougard's paste, but for satisfactory compounding it requires ordinarily somewhat more water than given although it is advisable to exceed the quantity in the formula as little as possible, so that the paste may be like stiff dough and then to add at the time of application a sufficient quantity of a saturated solution of cocain hydrochlorate to bring it up to working consistence."

The author then gives the formula for this treatment as follows:

"Prescription: Farinae triturate (wheat flour) pulverized amyli, each one-half ounce; pulverized arseniosi acid, four grains; pulverized hydrag sulph. rub., pulverized amminii chlorid, each twenty grains; pulverized hydrag chlorid corr., grains 2; zinc chlorid cryst., drams 4; water, one ounce. The first six ingredients are thoroughly mixed, the zinc chlorid dissolved in the water and the two mixtures rubbed up together secundum artem. This is spread on any suitable material and applied to the growth, extending slightly beyond the border. The depth destroyed is usually one or two times the thickness of the layer of paste. It takes about twenty-four to forty-eight hours for sufficient destruction; it is sometimes necessary to remove the mummified mass by paring it away and reapplying a fresh plaster. There is considerable inflammatory swelling. In superficial lesions rarely more than one application is necessary. The separation of the slough (cancer) requires from five to twenty days."

After referring to this manner of treatment by the caustic method he advises us at page 824 of his work that the arsenic paste is also good although more painful than the previous caustic treatment, and that Marsden, Robinson, Gottheil and others, including himself, have frequently employed this manner of treatment, and then states:

> "I have employed it, in most cases, in about equal proportions; in small and somewhat deep-seated lesions, using two or three parts of arsenious acid to one of acacia, making up into a paste with a saturated solution of cocain hydrochlorate. It requires from twelve to thirty-six hours for sufficient action, producing a good deal of inflammatory swelling and edema; occasionally a second application is necessary. It is painful, but many patients prefer it to surgical operation. *It is the principal ingredient in most of the quack cancer plasters.* The slough (cancer) separates slowly."

Here this learned allopath admits that he uses the same system that the defendant here adopts, but at once attempts to apologize to the old ethical profession by intimating that his only objection to it is founded upon the fact that "quacks" also use it.

In the light of the discussion of this treatment practiced by the defendant and so clearly defined by this orthodox of orthodox allopath writers, the statement of the counsel for the Government that cancer cannot be cured, and that the "Keen Cutter" method is the only way to treat it, certainly seems to be, to say the least of it, ill-advisedly made.

Again, the same distinguished allopathic medical writer from which we have heretofore quoted, to-wit, Dr. William Allen Pusey, has also discussed this subject in the Journal of the American Medical Association under date of November 5, 1910 (the official organ of the American Allopathic Medical Trust), on page 1611, under the head of "Treatment of Malignant Growth of the Skin from a Dermatologic Standpoint; by William Allen Pusey."

In this article of his he refers to another branch of importance in the treatment of cancer, to-wit, the *internal administration* of medicines, so as to prepare the system, or get the system in shape for the subsequent treatment, and on this head says:

> "Arsenic administered in large doses, undoubtedly has a definite effect on the nutrition or growth of the skin, and equally certainly some cases of sarcoma of the skin have been cured by the persistent and usually heroic use of arsenic. (Here admitting that even *internal remedies have cured cancer;* and here it is to be said that arsenic is a part of the internal or constitutional treatment used by this defendant and contained in the tablets described in the indictment.)"

This author then takes up the manner of treating cancer from an external standpoint and states:

> "The most popular method and the one of preference among surgeons is excision. Excision is the only method practicable in many carcinomas, as those of the internal structures of the body, and in such situations we must avail ourselves of the one resort we have. But there are broad objections in principle to excision in carcinoma (cancer). *In a large sense it is the crudest method of treatment.* It removes an entire part, in the hope of removing with it diseased tissues which form only a fraction of the whole. It takes no account of the ability of the tissues to assist in the defense against carcinoma. A clean excision, healing practically without inflammatory reaction must remove every cell of carcinoma to be successful. If it fails in this, no reaction has been excited in the tissues that may destroy remnants of the disease, on the contrary, lymphatic spaces have been opened up, and other opportunities given for the more favorable growth of any part of the carcinoma left. So, if clean ex-

cision fail in absolute removal *en masse*, the procedure has shot its one and only bolt, and the disease remains.

These are not the objections of one opposed to operations in carcinoma; they are inherent difficulties in the principle of treatment of carcinoma by aseptic excision *which if they could be avoided in all cases, would simplify the problem of successful treatment.* Surgery recognizes these difficulties in constantly devising more radical and still more radical operations. It also recognizes the great danger of clean incisions which go into carcinomas, whether through the body of them, or through the peripheral offshoots. * * * From the study of this series of cases he also calls attention (referring to Meller) to the often observed fact that operations which are not complete hasten the fatal termination of the disease by favoring extension along the opened channels and in the mutilated tissues. And he concludes: 'May these figures be a warning to all those who face this disease; without sufficient equipment the knife of the unpracticed, untrained surgeon does more harm than good.'

These facts are, of course, well known, and the statements from Meller are not quoted for themselves, but because of the corollary to them. *The corollary is that the dangers that arise from clean excisions in and about carcinomas should be avoided when the complete destruction of the carcinomatous mass is possible without resorting to such procedure.*"

In this same article the author under the head of caustics (which is the same term as escharotic) states:

"There still remains a group of agents which, experience has shown, *are vigorously destructive of carcinomas.* These are the strong chemical caustics, like caustic potash, zinc chloride, arsenious acid, and the strong mineral acids, the actual cautery and

highly actinic forms of radiant energy in the form of Roentgen rays and radium rays.

The advantage which comes from the use of strong caustics like potassium hydroxid, in treating carcinoma is that one is using an agent which not only *promptly destroys the cancer tissue* into which it penetrates, but at the same time blocks lymph channels and produces a violent inflammatory reaction that extends widely beyond the area actually destroyed—a reaction that offers a good prospect of destroying outlying diseased cells and that builds up a strong barrier of inflammatory connective tissue."

All of the above citation of medical authorities are wholly from the old line so-called regular physicians, and their evidence upon this subject completely refutes all the statements contained in the brief of counsel for the Government, not only showing that cancer has been and is being extensively cured, but that it is being cured and successfully treated by the escharotic (caustic) method exclusively employed by the defendant in this case in his large and extensive practice, and further brand the knife cutting as "the crudest of all methods." We may here suggest that the attack made by the allopath or knife cutting fraternity against distinguished physicians of the character of the defendant are not made for the reason *that he does not and cannot cure cancer*, but for the distinct and sole reason that *he does cure it*, and they know it. Because he does not adhere to and comply with the code of ethics of the American Medical Association and because he happens to belong to a different school, to-wit, the Eclectic School, he is therefore a charlatan and a quack, notwithstanding he is a graduate of a school

equally reputable as their own, and is authorized to practice under the laws of his state, and many other states, and is bringing about cure of cancer by the thousands, and in doing so adopting well known and successfully approved methods.

But, leaving now the authorities from the old line or knife cutting fraternity, let us call attention to another line, to-wit, the Homeopathic. In a recent article appearing in the January, 1911, number of the Medical Brief at St. Louis, Missouri, Dr. Charles Ott, Professor of Dermatology and Clinical Medicine, Kansas City Hahnemann Medical College, a Homeopathic institution, has discussed this question from their standpoint, which article is as follows:

> "It is to be regretted that in the teaching in medical colleges and in the work of the general practitioner the escharotic method has been overlooked or unjustly discarded, and its use has therefore been chiefly confined to the so-called cancer specialists of the advertising type, who have used this means to their advantage and have drawn away from the regular practitioner many cases that should have been treated by him.
>
> There are many so-called cancer pastes and plasters in use, every specialist claiming to have one that is best of all and refusing to divulge the composition. The fact, however, is that among all of them there is comparatively little difference. The writer's experience has been confined chiefly to a paste that is very simple, efficient and has this advantage—that it will not attack healthy tissue. It is composed of equal parts of pulverized sanguinaria, hydrastis and chloride of zinc, with sufficient water to make a paste, and before applying he adds usually about 2 per cent of orthoform as a local

anesthesia. This, when applied, will rapidly destroy infiltrated tissue, turning it white, and when it reaches the limit of that, separation will take place and the devitalized tissue will finally drop away. It will follow the various extensions of the growth in whatever direction it may be found, provided the plaster applied is large enough.

There is in all cases some little technique that needs to be understood in order to have the best results in the shortest time. If there is no opening in the skin or if the growth is covered by apparently healthy tissue, I usually resort to a method which will shorten the process. I paint the skin with pure carbolic acid, neutralizing that with alcohol, covering the surface with a strong saturated solution of potassium hydrate, that is permitted to remain until the pain becomes severe, when it is neutralized with dilute acid and the way for the other plaster is clear. If, however, the cancerous growth is large the rational way is to remove the visible growth in a surgical way and then follow by the application of the plaster for a short time to remove the infiltrated tissue that may have been left.

In epitheliomata of medium depth it will take only a few days to have devitalization complete, but as soon as detachment begins there is an accumulation of puslike fluid which, being unable to escape, will cause pain to the patient. I have often removed the devitalized tissue by slicing it off wherever it can be done, thus relieving the pressure and suffering.

This treatment is especially adapted to epitheliomata or skin cancers of all kinds. In order to maintain the patient's strength I usually apply it for about two to six hours a day, arranging it so that the patient will get good night's rest; if too painful, morphine or some other anodyne may be given.

> The after treatment is very simple, being practically none other than that of common wounds and the methods so well known to surgeons."

It is interesting to note, however, that the Hahnemann Medical College in which Dr. Charles Ott is Professor in Dermatology, teaches the escharotic or caustic treatment of cancerous growth, and that the graduates of Homeopathic Colleges throughout the country generally approve the escharotic or caustic treatment as distinguished from the surgical line.

Dr. Eli G. Jones, M. D., Burlington, N. J., in an article appearing in Ellingwood's Therapeutist, published at Chicago, Illinois, under date of April, 1910, (an Eclectic journal), contributes an interesting article upon the subject of escharotic or caustic treatment, and in discussing the subject says at page 128:

> "It has been the practice of many of the profession to cut out everything that looked like a cancer, but statistics will abundantly prove that *a surgical operation not only does not cure cancer,* but really hastens the death of the victim. A surgeon can only cut out what is seen and felt under the knife, while millions of cancer germs grow and multiply in the blood, the nuclei of future cancer. Another fact, the surgeon seems to forget that every operation is a shock to the nervous system, it lowers the nerve power, weakens the power of resistance to the disease and thus encourages the invasion of cancer. * * * I honestly believe that if it were possible to keep the vitality of a person at or near the normal healthy standard there would be no danger of cancer. We find in cancer victims weakened vitality and enfeebled nerve power; this gives us the key to the situation and tells us how to successfully combat the disease."

And again (p. 129):

"There are two things that we have to depend on for a cure:

First—We must raise the nerve power, the vitality of the patient up to or as near to the normal standard as possible.

Second—It depends upon whether the system of our patient will respond to the action of our remedies or not. In other words, we must begin at the very foundation and build up our patient to strengthen his power of resistance against the disease."

On page 130 he further states:

"From a careful study of the materia medica of the Botanic Eclectic, Homeopathic and Biochemical schools of medicine, I have found some *remedies that do have a curative effect upon cancer.*

These remedies have been tested by me again and again till I know that I can depend upon them, as I intend the object of this paper to be to teach physicians definite therapeutics and to help them cure their patients. My chief object in this, is to help the reader to get a better understanding of the rational treatment of cancer, and help you to cure your patients."

The medical magazine, in which this article appears is conducted by Dr. Finley Ellingwood of Chicago, one of the foremost men in the Eclectic School of Medicine in the United States, who was professor for years in the Bennett Eclectic Medical College of Chicago, of which the defendant, Dr. Johnson, is a graduate, and is the author of a standard work known as "Ellingwood Therapeutist and Materia Medica," also "Eclectic Practice," and is the recognized standard of that school of medicine.

Again, in Ellingwood's Therapeutist, a medical journal under date of February, 1911, just at hand at the time this brief is being prepared, is an article on the treatment of cancer found on page 44 by Dr. Irville Morse, M. D., Des Moines, Iowa, from which we quote from page 45 as follows:

> "After an experience of more than twenty years, during which I have treated many cases, I feel with Dr. John Shaw, of London, Eng., *that 'cancer is curable to the uttermost.'* I have seen cases that had been pronounced hopeless and in which the sufferer has been told that he had only a few days to live, get well; of course, they are few, but still it does happen. Seventy-five per cent of the cases of primary cancer should get well under the treatment which I have been using for some years, and that without the knife. Recurrent cancer is not so amenable to treatment, as only about forty per cent recover. With operation only twenty per cent are cured; eighty per cent die from a recurrence, either at the site of the operation or at some remote part. The surgeon will continue to advise operation as long as the money is in sight and the poor suffering patient will stand for it."

And again on page 46 he says:

> "Is it local or constitutional; there is a great diversity of opinion on this subject; the theory that it is of local origin is believed by most surgeons. They claim that if by an operation sufficiently wide to include all parts affected by infiltration at a date sufficiently early to have anticipated any extension of secondary deposits, will do away usually with the disease.
>
> But do the results of these early and complete operations cure a majority of cases? They do not, for in most cases (75 per cent) there is a recurrence,

which proves to my mind that cancer is not a purely local affection at any time."

And again on page 46 he says:

"A list of the names of the drugs that have been used would include a large part of the pharmacopeia. I have tried all suggested, with a varying degree of success. The treatment which in my hands has given me the most success follows: When a patient enters the sanitarium the first three or four days they have high colonis flushings twice daily, and such laxative medicines as may be indicated to 'clean out, clean up, and keep clean.' This is a most important measure throughout the whole course of treatment. A spare diet of easily digested food for the first week or ten days, when some improvement should be noticeable, and the amount of nourishment may be increased.

I demand absolute rest, both of mind (if possible) and body for three weeks; give the patient all the encouragement possible. Cheerful environment and a courageous physician help most wonderfully, after ten days' treatment, pain and fetor cease and the patient becomes more hopeful. I have never had to use morphine after the patient had been under treatment ten days.

The fourth day I commence with the following tablet, given three times daily: Methylene blue, four grains; thiosinamine, one-fifth grain; strychnine sulph., one-fortieth grain; nucleinic acid, three grains; ext. belladonna, one-fourth grain; ext. conium, one grain; mix. Twice daily I inject hypodermically one-half dram of lobelia. This injection should be given every twelve hours or oftener if no improvement is manifested in a week. The dose given of the lobelia is the average dose; I sometimes give more and sometimes less, according to conditions which may arise which can only be learned from actual experience.

Locally, if ulcerating, apply an infusion of violet leaves and extract of witch hazel. Apply with hot, wet compresses and use the leucodescent lamp for half an hour, twice daily; steam it good, you will be surprised to see the mass shrink after a few days' treatment. When there is no open sore, I use the hot infusion in the same way and inject a few drops of geranium into the lump as near the center of the lump as possible, once or twice a week; it causes some reaction, which quickly subsides and the tumor grows smaller after every injection. *I am confident that seventy-five per cent of primary cases can be cured.* In the last year I have cured every primary case I have had; to be sure I have had only a few (8), but even that number is sufficient to show there is some merit in this method."

In addition to the above citations it must not be overlooked that beside the specific treatment from an external standpoint, there also exists a well defined recommended remedy for the internal treatment which may be properly designated as constitutional treatment of the patient. These internal constitutional treatments which are to be indulged in, in conjunction with the external treatment of the cancer, are well known by the medical writers, and we call particular attention to the leading work of Dr. Ellingwood heretofore referred to, the standard Eclectic writer upon these subjects. The different remedies which he refers to as constitutional treatment and recommends in connection with the external cancer treatment giving the name of the article and the pages of the volume of his work in which they are set forth, are the following:

Acidum aceticum (acetic acid)	page 299
Acidum carbolicum (carbolic acid)	page 618
Alcohol	page 184
Chelidonium	page 395
Echinacea	page 708
Pepsin	page 366
Thuga	page 486
Trifolium (red clover blossom)	page 474
Phytolacca (poke berry)	pages 458-9
Conium maculatum	pages 91-92
Hydrastis canadensis	pages 196-7

and hundreds of other remedies are recommended by this writer for treating the various symptoms and conditions in connection with the cancer situation.

Now, having called attention to all of the above authorities covering this entire subject it becomes wholly unnecessary to further discuss the statement of counsel in their brief that cancer cannot be cured or any statements that they have made themselves or made from magazine quotations, that cancer is not curable by the escharotic or caustic method used and practiced for years by this defendant; and the above citation of authorities is a complete refutation to all the prejudiced articles written in Colliers and Ladies Home Journal, and other publications referred to by the Government and puts a complete quietus upon their statements and places the matter in such condition as that the court must conclude that such statements have been either ignorantly or maliciously made.

IV.

The defendant, as we have heretofore stated, is a regular graduate from the Eclectic School at Chicago, known as the Bennett Eclectic Medical College, and is authorized to practice under the laws of this state and many adjoining states, and has been engaged in the special treatment of cancer for a period of eleven years, and in that time has treated and cured hundreds and hundreds of cases of cancer, and in this connection we desire to call the court's attention to the appendix attached to this additional brief which appendix is the complete testimony taken in the trial of a case instituted in the Circuit Court of Jackson County, Missouri, by the old line medical profession known as the State Board of Health of Missouri, in 1907, wherein they undertook and attempted to oust Dr. Johnson from the practice of his profession upon the clear cut charge that he was guilty of professional misconduct because he claimed to cure cancer and they said it could not be done. On the trial of that case before the court, the Honorable Henry L. McCune, nearly two weeks was taken up in the hearing of evidence and cancer patients were introduced from all over the country who went before that court and clearly demonstrated the situation, the witnesses voluntarily coming from six or seven different states. They testified upon the stand to their cures, to the fact that old line physicians had been treating them, had pronounced the disease cancer and had given them up, and that complete cures were brought about. There were many of these cases

where five years had elapsed after the cures had been brought about. The old line medical profession was making desperate efforts to oust the defendant. The court, after a careful hearing of all of the testimony, decided against the State Board and held they were wrong, and found that cancers not only could be cured, but that the defendant was bringing about hundreds of these cures, and dismissed the petition of the State Board and reprimanded them for their narrow mindedness in attempting to prevent the defendant from bringing about cures which they themselves could not accomplish by the use of the knife.

The certified copy of the court's opinion is made a part of the appendix and which follows the testimony of the witnesses, and this is called to the court's attention as a distinct and positive refutation of the statement of the counsel for the Government that cancer is not curable, and a refutation of the intimations and statements of magazine articles and newspapers written at the instance of the allopath profession, that the caustic or escharotic treatment cannot and does not cure, and is a complete refutation of the narrowness of individuals no matter from where they come, or what their eminence may be, who undertake to call gentlemen of this character "quacks" and "charlatans," and indeed statements of this kind found in the magazine articles, is but the reflection of the supreme ignorance of the gentlemen who pretend to have written or hire them to be written. Such malicious and fallacious statements can only be accounted

for, upon the plan that, which Mrs. Allen adopted, to-wit, "Hiring some one to write imaginary articles, ignoring facts, and making them taking, so the publishers will use them." As we will hereafter explain.

But now to describe the treatment for cancer adopted and practiced by Dr. Johnson:

DEFENDANT'S MANNER OF TREATMENT.

The term, mild combination treatment for cancer, has been adapted by the defendant because of the fact of its best description of the treatment, and has become sort of a trade mark, and means a combination of remedies consisting of both local and constitutional ones prescribed according to the indications and requirements. There are no two cases of cancer exactly alike, consequently they cannot all be treated by the same combination of remedies, but must be varied according to the indications. The defendant has practically spent his entire professional life consisting of more than twelve years in the study and treatment of this one disease alone with its attending complications. During that time he has had under treatment in his office all the way from ten to fifty cases each day, which must of necessity afford him an excellent opportunity of a clinical study of this disease.

In the early stage there are but few constitutional symptoms that present themselves in a case of cancer, however, there are a few that are usually present, and which require special treatment. It may be but an obstinate case of constipation, and apparently to one that

has not made a study of the disease, would have little or no effect on the cancerous condition, but such is not the case. This must receive special attention and the bowels and stomach put in a good condition as soon as possible. This requires the administration of such well known cathartics and laxative that all physicians are familiar with, and are not given for any direct effect that they might have on the cancer, but are given for the purpose of putting the system in good, healthy condition as recommended by the writers heretofore set forth. If there is any kidney trouble this is carefully looked after and prescribed for, likewise the condition of the stomach, nervous system, nutrition, etc.

The various preparations that are mentioned in the indictment comprise only a part of the mild combination treatment for cancer, two of them confined to constitutional treatment and the remainder to be used externally. The object of this preparatory treatment was to reduce and allay inflammation, cleanse the sore and to remove the odor, after which, had the treatment been followed out as it was intended to be by the defendant, the escharotic treatment would have then been used, the latter being also a part of the combination treatment for cancer, and by this treatment the cancerous, or diseased tissue, would have been destroyed and sloughed off or dropped out, as many of the witnesses described whose testimony is found in this brief, after which a healthy sore would have been the result; at which time the escharotic part of the treatment would have been discontinued, and still another treatment would have

been taken up, namely, the healing treatment, a part of the mild combination treatment. This last part of the treatment consists of antiseptic washes, healing ointments, dusting powders, etc. Under this last named part of the combination treatment for cancer, the wound would readily heal, leaving more or less of a scar to mark the former seat of the location of the cancer.

The defendant has never claimed to have made any wonderful discoveries, or any new treatment for cancer. His knowledge has been gained by his daily coming in contact with the various cases and his study from a clinical standpoint under the use of the various and well known preparations in the different medical works which have been recommended as beneficial in the treatment of this disease, and the same knowledge could have been obtained by any physician devoting the same amount of time and effort.

No secret or mystery is claimed by the defendant of any kind or character. He makes no claim and never has made claim to having any exclusive remedy to cure cancer. His practice has been open and above board, he using the remedies recommended and approved by the standard writers of the country.

We here desire to state to the court in the large number of cases that he has cured, and in curing the cases of the witnesses whose testimony appears in the appendix to this additional brief, precisely the same character of medicines and treatment were used in curing and treating their cases as are referred to in this brief and set out in the indictments in this case. The defendant is

not claiming to be a discoverer of anything. He simply adopts and makes use of the remedies laid down by standard medical authorities and writers, supplementing it by the long clinical experience he has had of the treatment of so many varying cases.

V.

When parties undertake to belittle or criticize the remedy or system practiced by defendant they are deliberately making statements which demonstrate their ignorance, or manifesting a dogmatic frame of mind emanating from the surgical Keen Cutters of that profession known as the allopaths, who will never yield as long as money can be procured for the use of the knife, and who will condemn any treatment of this character, because it is not remunerative enough, and easily obtainable by the common people of the country. Those who assert such dogmatical propositions as are asserted in the articles published in the magazines, are either themselves members of, or prompted by the doctors of the American Medical Association, and it is beyond reason to expect anything else from the attitude of an institution whose medical ethics are displayed by the following rules, taken from the Code of Ethics of the American Medical Association, to-wit:

> "Sec. 7. It is incompatible with honorable standing in the profession to resort to public advertisement or private cards inviting the attention of persons affected with particular diseases; to promise radical cures; to publish cases or operations in the daily prints, or to suffer such publica-

tions to be made; to invite laymen (other than relatives who may desire to be at hand) to be present at operations; to boast of cures and remedies, to 'adduce certificates of skill and success, or to employ any of the other methods of charlatans.'

Sec. 9. All discussions in consultation should be held as confidential. Neither by words nor by manner should any of the participants in a consultation assert or intimate that any part of the treatment pursued did not receive his assent."

An attack of the character displayed by these newspaper and magazine articles can be readily accounted for when we find that the ethics of this association condemn and brand other physicians as charlatans who shall claim to promise cures of anything, or to ask or invite those who are suffering from disease to submit themselves to treatment and cures, and that shall deliberately prevent one of their members called into consultation from telling the truth or exposing the blunders of his fellow medical brothers, thereby countenancing, furthering and sustaining deliberate and premeditated operative crimes from being exposed, and preventing the helpless and confident patient from knowing the truth or being informed of the mistakes or even crimes practiced upon him. When such a malicious and money grasping Code of Ethics emanates from any such a profession we can easily imagine the readiness with which they would grasp upon every opportunity to subsidize magazines and newspapers and procure malicious and unsustained articles to be written (and we will hereafter show the circumstances under which these articles were written), and foster all means that would tend to put out of existence

all other schools of medicine, but their own. And not stopping at this, they further desire to have even a cabinet position created at Washington to be presided over, of course, by their school, so that all systems, theories and discoveries that are not in harmony with their own would be pronounced quackery and charlatanism. Such methods and purposes are characteristic of those who would slaughter humanity, or allow it to be sent to the grave rather than admit its dogmatic system to be subject to change or capable of overthrow by modern discovery.

This medical association is pretending to belong to the "holier than thou" association, and yet if the investigation made by Mr. Edward Bok, editor and proprietor of the Ladies Home Journal of Philadelphia is true they themselves while claiming to make a fight upon patent medicines, and specialists who claim to cure disease not according to their means, are secretly and constantly engaged in prescribing patent medicines to their own patients. Indeed, Mr. Edward Bok of the Ladies Home Journal of Philadelphia, while engaged in his misinformation undertaking, made a discovery concerning the allopath or old line physicians, and in an address afterwards made and printed in the Journal of the American Medical Association, of date Feb. 23rd, 1907, Mr. Bok said:

> "Your own Dr. Jacobi says that in a New York drug store, investigation showed 70 per cent of the prescriptions sent in by reputable (ethical) physicians contained either nostrum, pure and simple, or as a part of a compound. Dr. Billings of Chicago says the record of one drug store showed 42 per

cent, another 50 per cent in Boston 37 and 48 per cent.

When I heard the first mutterings of this condition I gave it no credit. But instance after instance came to me until I could no longer turn aside and I determined to find out. And I did.

Conditioned that I should not reveal my source of information, nor give names of remedies or physicians, I was given an opportunity to examine 100 prescriptions that had been filled. Of these 100 prescriptions 42 prescribed a proprietary drug or article in part or in whole. I selected 30 of these and called on each of the physicians who had written these prescriptions. Now gentlemen, these physicians were men of excellent standing, some very high in their profession and how many of these 30 physicians would you say gave me an accurate, or anything approaching an accurate analysis of the ingredients of the nostrums which they had prescribed? How many? Two gentlemen; two out of all the thirty. The rest either did not know, or —what is even more dangerous—thought they knew when they did not. * * * And so I might go on; not isolated cases, not a case here and a case there, but a condition that is dangerously general.

Now, what is the result? The physicians are doing precisely what we are asking the people not to do; not to use these 'patent medicines' because they do not know what they contain. * * * If you are going to prescribe patent medicines *why should the layman pay your fee as a physician in addition to the cost of the medicine which he can buy himself?* We are preaching to the public to stop the nefarious habit of self doctoring, but the physician by such methods as these are driving the people to doctor themselves, driving them to the quacks.

* * * You are here tonight to discuss the suppression of quackery, but it seems to me you have chosen the wrong topic. Your question should be the suppression of the physician in his aid of quackery."

So that we find that these physicians when their ethical profession will permit them are falling in and sanctioning the very class of treatments and medicines that their ethical profession in their financial interests are seeking to condemn, and forces upon us the inquiry, "who is the quack and who is the charlatan? Is it the ethical pretender, or the advertising specialist? Is it the Keen Cutter or the proprietary medicine man?"

Although there will be found in the appendix attached to this brief the full testimony of witnesses who testified on the trial of the case in which the State of Missouri, through its State Medical Board was attempting to prevent Dr. Johnson from curing cancer, and in which action they failed, yet we consider it would be of interest to here for sake of brevity, state the effect of that testimony, and as to what each witness in substance said, and as to what the conditions of each treatment were, which statements were all made under oath:

1. Pembrook McComas, page 78, testified that he was 74 years of age, resided in Platte County, Missouri, came to Dr. Johnson at Kansas City to be treated for cancer on the upper right cheek. Had suffered from it for six years. Had an allopath physician examine it and attempt to treat it. This physician pronounced it cancer. Dr. Johnson had treated him for about five weeks, removed the cancer and produced a complete cure. At the time of removing the cancer it was placed in a bottle and taken away by the patient to his home. On the trial of the case, three years later he produced the bottle containing the cancer. This bottle was at the

trial delivered to a prominent microscopist and pathologist who made an examination with the microscope and the next day reported it as true, genuine cancer.

This trial was had in May, 1908, three years after his treatment, and it has now been three years since the trial, making six years since the final cure, and no sign of a return.

2. Henry Hollrah, page 90, testified that he was a farmer residing at Sweet Springs, Missouri. Came to Dr. Johnson for cancer of the lower lip with which he had been afflicted for about seven years, which extended from the corner of the mouth two-thirds of the way across the lip. He was treated by Dr. Johnson before the date of the trial in 1908. Old line allopath physicians had informed him that he had cancer and treated him for it for nearly eight months before coming to Dr. Johnson and they had used the X-Rays on him giving him 168 exposures. At the end of the treatment he was worse than when he began. He came to Dr. Johnson and received six weeks' treatment and went away cured, and is well today. This witness, as well as the previous one describes the cancer as sloughing or dropping out, leaving a healthy sore that soon heals.

3. Frederick A. Shely, pages 109 and 110, testified that he was a resident of Humboldt, Iowa, was 73 years of age and a farmer by profession. Had cancer on the right side of the neck of six years' standing. It measured nearly 2½x3½ inches. Had a microscopical examination made in Iowa City, at the Iowa University, before he came to Dr. Johnson. These physicians cut out a piece

of it and had it examined and pronounced it cancer. Dr. Johnson pronounced it cancer also and treated it, resulting in a complete cure.

4. Mrs. Ella Harper, page 152, testified that she resided at 506 Wabash Avenue, Kansas City Missouri, came to Dr. Johnson for treatment of cancer of the uterus from which she had been suffering for more than a year. Had two allopath physicians who attempted to treat her prior to this, to-wit Dr. Marshall and Dr. Riegle and both pronounced it cancer. She testified that she had a sister who had died from the same disease and she also was treated by this allopath physician, Dr. Riegle and died under his care. Dr. Johnson treated and completely cured the witness, Mrs. Ella Harper, and she is well to this day.

5. Dr. D. H. Riegle, being the same doctor that Mrs. Ella Harper testified she had been treated by, for this same cancer trouble that Dr. Johnson cured, was put upon the stand and testified on pages 168 and 193 that he had treated it and had pronounced it cancer and failed to cure it. He testified that he was an allopath physician and that he examined her two years after Dr. Johnson had cured her and pronounced her well. It is proper to state, however, that this testimony was reluctantly drawn from him and the remarkable thing is that after he had admitted it all he then stated although it was a complete cure, "that his school of medicine (the allopath) would not recognize that kind of a cure."

6. William C. Lyon, testified, page 161, that he was of Waverly, Kansas, was 74 years of age and a re-

tired farmer. He had cancer of the nose five years' standing. Was treated by some of the physicians of his town and they pronounced it cancer. Was treated by Dr. Johnson and completely cured. Had been cured two years before the date of the trial and remains permanently cured.

7. Mrs. Hattie J. Wood, page 164, testified that she resides in Perry, Iowa, was 52 years of age, affected with cancer of the right breast. Heard of Dr. Johnson from two other ladies of her town had been cured of cancer of the breast by Dr. Johnson. Dr. Johnson treated her eleven weeks. She testified that the cancer when the treatment was ended "just dropped out, kind of sloughed off and rolled out." Was as large as an egg. She is completely cured and never has had any trouble since. She was also treated by what was known as the constitutional treatment as preparatory to the final external treatment of the cancer.

8. Charles W. Moss, page 185, testified that he resides at Atkinson, Nebraska, was sixty-six years of age, had cancer of the rectum. Before going to Dr. Johnson had a microscopical examination made by allopathic physicians who pronounced it cancer and advised cutting. Was treated by Dr. Johnson 2½ months in 1904 and resulted in a complete cure, and is well to this day.

9. Mrs. Louisa Kind, page 223, testified that she resides at Searles, North Dakota, had cancer of the stomach, had been treated by allopath physicians before coming to Dr. Johnson, for over a year. These allo-

paths pronounced it cancer and said she could not live five weeks longer, got down to be a mere skeleton, weighed less than 100 pounds. At the time she was on the witness stand she weighed 170 pounds, had such a serious case of cancer as to reach the stage known as the "coffee ground vomit," and she was treated by Dr. Johnson in 1905 and a complete cure resulted and she remains permanently cured at this time.

10. Otto Kind, page 233, husband of the last witness, testified that he was of Searles, North Dakota, that he had taken his wife to the old line physicians before coming to Dr. Johnson and he said to those physicians "Doctor I want the truth from you, what is the matter with my wife, what is she suffering with?" And they answered: "Kind, I will tell you, it is cancer of the stomach and I don't know what we can do for it." That he then sent for another physician, a Dr. Farnsworth who diagnosed the case and said it was cancer. Not being satisfied with that he took his wife to a Dr. Aguermann and he pronounced it cancer. He then took his wife to Dr. Small's of Des Moines, Iowa, and this physician stated that his wife was so far gone that they could do nothing for her and could not cure her. That while at Des Moines he had heard of Dr. Johnson and concluded to have him treat her. That Dr. Johnson did treat her and brought about a complete cure. He further stated that he paid these allopath physicians that he had consulted all together $1400 and that he paid Dr. Johnson for curing her $27.50.

11. Dr. Charles Ott, page 121, an eminent physician, and president of the Hahnemann Medical College, Kansas City, and a man of large experience in cancer treatment, testified that he had been treating and curing cancer for many years by the escharotic or caustic treatment and taught it to the students of the medical college of which he was president. His testimony is instructive and interesting.

12. Dr. E. M. Purdue, page 199, a physician and graduate of the Hahnemann College, and occupying the chair of Histology, Bacteriology and Pathology in that institution for ten years, and in charge of the Laboratory for it, and a member of the Microscopial Society and a man of such eminence as to have been employed at times in the State Board of Health of Missouri, (the old liners), and called in consultation by members of that profession. He testified that he had examined the cancer in the bottle exhibited to him in the court room and taken from the witness McComas. That he had given it a microscopial examination and found it to be cancer of a pronounced type. This witness then as an expert went thoroughly into the question of the treatment and cure of cancer, demonstrating clearly the efficacy of the caustic or escharotic treatment for cancer. He testified that he was familiar with Dr. Johnson's manner of treating cancer and that a large number of cures, to his knowledge had been brought about, and that there were well known and efficient remedies laid down and recommended in the various text books which Dr. Johnson employed, and that they not only would, but

did cure the cancer. The opinion of the trial court is found commencing bottom of page 243 and the final decree at page 250.

Therefore after having called attention to all of the above from the standard text writers and the sworn testimony of the witnesses whose cancers were actually cured by Dr. Johnson's mild combination treatment and a description of his own treatment the irresistible conclusion is forced upon us:

First. The statement in the brief of the counsel for the Government that cancer could ~~not~~ be cured by the knife is absolutely disproven.

Second. It is positively proven that the escharotic or caustic method used by the defendant in this case and termed by him "Mild Combination Treatment" conforms to the recommended treatment laid down by the medical writers as one of the methods of treatment and cure for cancer, and by many of them as the *better cure for cancer.*

Third. Not only that his method is a cure for cancer, but it is established by the evidence from the mouths of the witnesses themselves that he has and does cure it, and

Fourth. That the statements from Colliers Weekly, Ladies Home Journal, and quotations from allopath professors from Universities, found in the Government's brief are absolutely unsustained and either ignorantly or maliciously made.

With all of the above matters before this court for consideration we think it may further be taken as conclusive, that the Congress never intended for a moment by the law in question, to invade this field, or undertake to prevent the cure of cancer by competent physicians in that behalf, or to permit inquiry into the con-

flicting opinions of the knife cutters, and the other schools of medicine, and especially when the old line writers themselves recognize the fact that the treatment practiced and advocated by the defendant is proper in every respect, and if Congress did intend any such an unreasonable construction to be placed upon the law what school of physicians did they expect the question to be tried by? If the therapeutic practice of physicians was to be a subject of inquiry before the courts and juries of the country what class of testimony did they expect the jury to accept? Was the question of future discovery by bright and intelligent physicians to be condemned unless it emanated from, or met the approval of the American Medical Association? And is the virtue of recent discovery to be given approval, only because and alone, that it shall meet the approval of the allopath? The theory of the American Medical Association and the allopaths that are responsible for the tirade against all medical professions that do not affiliate with them, is that no remedy advocated by any other school or profession can cure anything, or is a remedy for anything, and that all others are quacks and charlatans, and that every physician in the country who does not adopt their theory, should be subject to indictment and that notwithstanding the fact that their own allopath writers are admitting the defendant's method to be correct under the construction sought to be placed upon this law, the members of that old line system would go upon the stand and positively swear that any remedy not recommended by them would not bring about the results claimed because it was not recognized by their school, and by the same token every allopath physician could be indicted and convicted if on the other hand the Eclectic or Homeopath should go upon

the stand and condemn their remedies. Thus it is seen that the subject is not and cannot be one of determination of fact as the determination of facts is recognized in the law. It does now, and must forever remain a subject incapable of proof, and must forever remain so unless a quietus is to be put upon medical discoveries.

VI.

AS TO THE MAGAZINE ARTICLES IN COLLIERS, LADIES HOME JOURNAL AND OTHER LIKE PERIODICAL QUOTATIONS CONTAINED IN THE GOVERNMENT'S BRIEF.

Let us take these articles in their reverse order. One of them is an address or speech by Mrs. Martha M. Allen, delivered before the National Women's Christian Temperance Union Convention in Philadelphia in 1904 This distinguished lady was not and does not claim to be a physician, or have any knowledge of medicine. The knowledge that she acquired was probably obtained by articles written by other people to her. In addition to this she would naturally be opposed to any kind of patent medicines or nostrums that contained alcohol, because she had charge of the department of non-alcoholic medication for the National W. C. T. U. and her lecture was being delivered from the standpoint of the temperance agitator, and any nostrum that contained a suspicion of alcohol would, of course, belong to the "Devil's Own," regardless of its otherwise salutary virtue. But it would be interesting to know where this lady received the information that she was evidently attempting to unload upon the public. This distin-

guished lady seems to have been engaged in the business of employing people to write articles for publication and to have solicited written articles from other parties for her use and benefit regardless of whether they were true or not. Indeed, we find that this lady in her campaign for information, and her desire to get into print was prompted by such motives that no credence whatever can be given to her statements. During her campaign for information and her effort to procure articles to be written we find a remarkable situation which we are sorry to be compelled to ascribe to a lady occupying such a virtuous position as suggested by her title, "Superintendent of the Department of non-alcoholic medication."

On March 4, 1905, in answer to some advertisements that she was running in the newspapers offering cash for stories that might be written against the evil of alcoholic patent medicines, the following letter was written to her:

"Detroit, Michigan, March 4, 1905.

Mrs. Martha M. Allen,
Oneida, N. Y.

Dear Madam:

With reference to your cash offer for stories anent the evil of alcoholic "patent" medicines, I write to know if the story must deal with *actual facts* or may I employ *imagination* to picture the harm they do?"

(Signed) E. E. Gallogly.

In response to this letter this distinguished lady wrote a letter an exact fac-simile of which is as follows:

"Wine is a mocker, strong drink is raging, and whosoever is deceived not wise."—Bible. Do you believe this, or are you deceived by it as

National Woman's Christian Temp

Department of Non-Alcoholic Medicatio

Mrs. Martha M. Allen, Superintendent.
27 Broad Street.

Oneida, N. Y., Mar

Mrs. P. E. Gallagly
124 Lothrop Ave.,
Detroit, Mich.

Dear Sir You are at liberty to
nation. All I stipulate
matter shall be well. Drink
it may be taking
if it is published

Yours respectfu
M. M. All

For convenience in reading we put it again in print:

"Wine is a mocker strong drink is raging and whosoever is deceived thereby is not wise.—Bible. Do you believe this or are you deceived by it as medicine?

National Woman's Christian Temperance Union.
Department of Non-Alcoholic Medication.
Mrs. Martha M. Allen, Superintendent.
27 Broad Street.

Oneida, N. Y., March 6, 1905.

Mr. E. E. Gallogly,
124 Lathrop Ave.,
Detroit, Mich.

Dear Sir:—

You are at liberty to use *imagination*. All I stipulate is that the matter shall be *well written*, so that it may be *taking*, when published, if it is published.

Yours respectfully,
M. M. Allen."

Did this lady engage in this kind of business and deliberately announce herself as willing to ignore all facts and indulge in the field of imagination for the purpose of procuring villifying articles written for cash, knowing in advance that they were not true and knowing in advance that they were not expected to be true?

It will be noted from the date of her letter that it was March 6, 1905, that this *imaginery* and *fact-evading* campaign of hers was going on, which was about the same time that these various articles were appearing in the magazines of the country, and was evidently a part of the same deliberate falsifying campaign. May we

therefore ask what credence is to be given to the statements of this lady when she was allowing the National Woman's Christian Temperance Union to be first used by the medical profession, and second to allow it to be used by knowingly soliciting articles not founded upon facts but drawing upon imagination, and not only articles that should draw upon imagination, but that they should sufficiently draw upon the imagination to be "taking" by the publishers? What publishers were taking these articles? Evidently the publications that were publishing articles at that time, and what were those publications being run at that time? Again one of these articles is written by a party by the name of Mark Sullivan, whose identity, and whose place of location we have been unable to determine. May we therefore suppose that his article also was one of the imaginary, fact excluding articles, that was to be "taking" by the Ladies Home Journal so that it might be published? Who was it that was paying for this campaign?

But the article claiming to be written by this Mark Sullivan in the Ladies Home Journal and the other editorial printed in the Government's brief appearing in the Ladies Home Journal was the same journal of which Mr. Edward Bok was editor and proprietor, and this same Mr. Edward Bok, as we have heretofore shown, after he had lent himself and his journal to this villifying campaign, which he had supposed to be true, and not knowing, of course, that it was written upon imagination and for the purpose of being "taking"; afterward began an investigation on his own account, to see whether these

things that were published were true, and he then discovered that the nostrums and practice which his magazine articles were pretending to attack as worthless, and as being advertised and practiced by advertisers, was in fact medicine of virtue, and of such virtue that his discovery brought to light the fact, that the allopath physicians were themselves using the so-called nostrums and were prescribing them in their own practice, and in a lecture delivered on the 23rd day of February, 1907, before the physicians of Philadelphia stated among other things:

> "Your direct co-operation with the patent medicine curse, a co-operation that I confess, gentlemen, is nothing short of appalling. I give you my word for it that as one of the results of my investigation of this question there has come to me an amount of evidence as to the unintelligent prescribing of secret proprietary medicines on the part of physicians that, if published, would tend to cause an amount of unrest and distrust on the part of the public that is mighty unpleasant to think of.
>
> Your own Dr. Jacobi says that in a New York drug store, investigation showed 70 per cent of the prescriptions sent in by reputable (ethical) physicians contained either nostrum, pure and simple or as a part of a compound. Dr. Billings, of Chicago, says the record of one drug store showed 42 per cent, another 50 per cent; in Boston 37 and 48 per cent. * * *
>
> Conditioned that I should not reveal my source of information nor give names of remedies or physicians, I was given an opportunity to examine 100 prescriptions that had been filled. Of these 100 prescriptions 42 prescribed a proprietary drug or article in part or in whole. * * *

> Now what is the result? The physicians are doing precisely what we are asking the people not to do: Not to use these 'patent medicines' because they do not know what they contain."

So it will be seen that when these articles were published in the Ladies Home Journal and which were evidently of the imaginary kind, and written for the purpose of deceiving the public, and creating a prejudice by deliberate misrepresentation, that the editor of the Ladies Home Journal did not understand the situation and was prompted to make an investigation among the ethical allopath profession, and then he discovered a state of facts which proves conclusively that the old line physicians were using the very so-called nostrums and patent medicines and adopting the methods and practice of the very people, which in print they were attempting to condemn. Why did they adopt them? It certainly cannot be that the old line allopath physician would be adopting these medicines and practices of other schools unless the remedies and practice met the approval of the old line physicians, and if they were not medicines and practices of virtue, why should the allopathic profession to such a large extent be adopting the very things that these magazine articles were seeking to condemn? So that Edward Bok, the editor of this journal, made the discovery that so-called "quackery," which he supposed did in fact exist, or at least if it was to be branded as "quackery," was a kind of "quackery" which the allopaths themselves had given sanction to, and they had approved as worthy of copying themselves.

So that when we get at the secret of the matter we find that the allopath physicians when they come to practice medicine for the benefit of their patients, and get away from the ethics and rules of the old line physicians, are even themselves becoming wise enough to adopt good methods and administer the proper kind of treatment, even though it may not be recommended by the code of rules of the old liners. In other words, the discovery that modern intelligence has brought about, has found its way even into the practice of some of the allopaths.

It is here worthy of note that this lecture of ~~Dr.~~ Mr. Bok's was printed in the American Medical Journal under date of February 23, 1907, which is the chief organ of the allopathic trust of the United States.

Another article referred to by the Government in the appendix to the brief is from Collier's Magazine, being a scurrilous attack by one "John Hopkins Adams." We have been unable to learn who he is, but it is evident from the reading of his article, that it is also of the imaginary magazine "taking" kind, and from a lecture which he delivered after these articles were written before the Maryland State Medical Association and printed in the Maryland Medical Journal of February, 1906, commencing at page 60 and following, it therein appears that he is not a physician at all, but is a journalist and in that lecture he makes a confession that shows what the old line medical association were attempting to do, and how they had been giving him from time to time information that was false and urging it upon his attention for publication. In that address he makes this confession:

> "From suggestion to criticism is but a step, and for the moment I am going to assume the privilege of plain speech and point out what seems to me a vital weakness of the *medical opposition* to patent medicines. You have not, as a profession, an intelligent idea of the forces which you are fighting. *Since entering upon this field of work I have received from physicians enough fundamental misinformation to keep me in jail for the rest of my natural life on libel charges had I accepted one-tenth of it.*"

Here it clearly appears that while he was engaged in this so-called campaign of his in publishing articles in Colliers, the old line physicians in whose interest he was writing the articles, were constantly flooding him with fundamental misinformation, thus displaying clearly the disposition and intent of this movement, and showing how little reliance can be placed upon information which he undertakes to publish, and which he did publish, when he admits by his own statement that he could not believe one-tenth of it. He then in his lecture proceeds to give some of the illustrations that these practicing ethical physicians had attempted to foster upon him, and one of the instances he mentions is where a practicing physician undertook to make the statement that Peruna was loaded with cocaine, that he afterwards made an examination and found out that this was not true. And gives another illustration where a physician from St. Louis wrote to him to the effect that Dr. Hartman of Peruna fame was dead and that the young man who had taken his place was an impostor, when, as a matter of fact, this was not true, and that Dr. Hartman

himself is still living and is nearly seventy-six years of age. He again says that dozens of physicians had spoken to him about cocaine in coco cola, and that an examination showed that none of this was true and that many physicians had urged him to attack Piso's Consumption Cure on the ground that it contained opium, and that an examination showed that this was not now true, although it had at one time contained opium.

After giving these illustrations and speaking of this old line profession he makes this remarkable statement:

> "Such cases as these show how dangerously swift the profession is to jump at conclusions."

And again in this same address he undertakes to criticize the old line physicians for the reason that they write prescriptions that nobody can find out anything about, or know what is in them. He refers to the fact that these prescriptions are written in Latin and Egyptian signs, and then says:

> "Of course, we must grant that there are times when it is best for the physician to hide from the patient the nature of the remedy."

This distinguished gentleman in this expression certainly had reference, however, only to the old line profession, that it was best for them that they should hide the nature of the remedies probably for the reason, as Mr. Bok had discovered, that they, themselves were using the patent medicines and so-called nostrums which the profession was seeking to condemn, and therefore if they should disclose what they were, that it might be discovered that they, in fact, were the false pretenders, as they really were.

But in reference to this same "John Hopkins Adams" it seems that after he had commenced this tirade in Collier's Magazine an old line physician of St. Louis and editor of the St. Louis Medical and Surgical Journal undertook for himself to find out what the facts were about these statements that "John Hopkins Adams" was making, and wrote an editorial in that medical journal, Volume 90, No. 4, in which he said:

"EDITORIAL.

COLLIER'S METHODS EXPOSED.

Pipe Dreams Versus Facts—The Deadly Parallel.

Last December Collier's Weekly published a list of *22* supposed cases of death and serious illness from 'headache powders' which, on investigation by the Proprietary Association of America, were proven to have been mostly lies or gross exaggerations. Only six of the said *22* cases were discovered to have been *bona fide* cases of poisoning, and nearly all of these were due to overdoses. No sane physician will condemn a drug or medicine because an *overdose* results unfavorably, for if we did we might better quit the practice of medicine than to treat patients with drugs so inert that overdoses will never do harm. Any drug or medicine which is safe if taken according to the directions on the package is a safe remedy in the sense in which the word *safe* is used in medicine.

After the exposure by the Proprietary Association of America, of the mendacity of Collier's Weekly, said paper attempted to excuse itself for its lies on the ground that the cases were distinctly stated to be given upon the authority of reputable newspapers. All newspapers are supposed to be reputable until proved to be the contrary, but if a paper published a statement to the effect that Norman Hapgood, while attending a banquet in St.

Louis recently became beastly drunk, would we be justified in publishing the occurrence as a fact, without investigation? If some newspaper alleged that Samuel H. Adams while in Albany during the recent legislative session, acted as a lobbyist in the interest of the A. M. A. and spent large sums of money to obtain the enactment of the Stevens-Wainwright bill, would we be justified in publishing the statement as a fact without making an investigation of the matter?

Norman Hapgood and Samuel H. Adams know absolutely that there is a conspiracy on foot to injure the well-known, safe and reliable coal tar drugs, especially acetanilid, because same are used in headache powders, and where facts cannot be found they must be manufactured. What is easier than for one of the conspirators to telegraph from Kalamazoo, for instance, to a New York newspaper that 'John Smith died from taking headache powers'—and though John Smith fell into a well and was drowned, 'a reputable newspaper' 'said he died from headache powders' and therefore Collier's Weekly is justified in saying that John Smith died from the effects of headache powders. And upon this kind of lies they base their claims of the dangers of headache powders. If, as stated above, some country newspaper should say that Norman Hapgood got drunk on wine and Samuel H. Adams lobbied in Albany, we would have as much evidence upon which to moralize regarding the dangers of wine bibbing and the corruption of legislatures, as Collier's Weekly had when it based its argument against acetanilid on inspired, malicious newspaper reports.

In a recent number of Collier's Weekly there appeared another list of supposed cases of poisoning from headache powders and knowing the result of the former investigation we were interested to discover what kind of 'pipe dreams' said paper was this time handing out to its readers as facts. We accordingly submit herewith 'the deadly parallel' to

show the nature of the matter published in Collier's Weekly to sustain its malicious and lying attacks on a well-known drug."

(The editorial here then sets out the cases which were taken up by Collier's and in parallel columns shows the facts in reference to each particular case demonstrating their untruth as shown on an investigation made.)

The article then continues as follows:

"In conclusion, Samuel Hopkins Adams poses as a reformer, as a man who is devoting his time and money to the exposure of 'The Great American Fraud'—yet in an article covering scarcely three pages of his magazine, he proves himself 21 times a liar. What credence can be given to any of his statements, what confidence can be placed in a magazine conducting a campaign along lines so grossly mendacious and so maliciously distorted? It is indeed rare to find a man of standing in the profession of literature who is so careless of the results of his work that he will attempt to build up an argument upon evidence so easily disproved and so palpably and clumsily manufactured, as does this new Ananias, 'Samuel Hopkins Adams.' Norman Hapgood, the editor of Collier's, is equally to be censured for the publication of such libels without sufficient foundation of fact. However, like Oscar Wilde, he is probably more to be pitied than censured for his lapses from the straight and narrow path of righteousness. Now that the blowholes have been exposed excuses should be in order, but we do not expect or await any acknowledgment.

Ohmann-Dumesnil."

VII.

This constitutional treatment of the system of the patient is by modern writers beginning to be recognized

as one of the most important things in connection with the treatment of cancer, and one of the necessary treatments. Indeed so distinguished authority as Dr. E. Mather, member of the Royal Institution of Public Health League, England, member of the American Association for the Advancement of Science, delivered an address before the California Eclectic Medical Society and printed in the California Eclectic Medical Journal just issued under date of February, 1911. In that address on page 38 he pays particular attention to this subject wherein he states:

> "I will here state without fear of criticism, that I have on more than one occasion, seen incipient malignant disease attacking the servix uteri, which has completely disappeared after treatment, directed solely to the primary morbid condition, this being followed by the restoration of the organ to its normal state of health, thereby enabling it to resist the encroachment of the disease. Therefore, with confidence, I affirm that malignant disease in its early stages may be successfully combated with *constitutional treatment;* this statement, I know, will be looked upon by those who think cancer as incurable under any treatment. Still it only goes to confirm my view that it is essentially a disease whose potency can be developed only upon a weakened organ, and becomes powerless to develop its malignancy in any part which is vigorous and healthy. At the same time it also points to the line of treatment that should be pursued, viz: to endeavor to restore the normal standard of health to the structure which has been prayed upon in consequence of its departure from its standard; therefore I hold that this is the fundamental principle one should act upon at once, if we are bound to succeed in the treatment of the dreadful disease."

We are but stating the facts when we affirm that the American Medical Association made up of the old line or allopath physicians and surgeons, is one of the best organized political institutions in the country. Not only does it dominate the medical side of the Agricultural Department, and the branch known as the Fraud Order Department, but it seems that it has now succeeded in inoculating one of the distinguished members of the Attorney General's Department, to-wit, the gentleman who wrote this brief for the Government, and having attempted to cover these three departments they are now engaged in the campaign to have a cabinet position created over which, of course, their political machinery will demand one of the knife cutting, and allopathic persuasion as the head and dictator, and then suffering humanity will have nothing to do but to take their "pink pills" and submit to their decrees for carving the human system, when and where they say, and may probably even ask an Act of Congress fixing the cutting charges high enough to make it remunerative.

Not only this, but we now find that since the original briefs were printed and filed in this case, that Collier's Weekly has been used as the medium by which they are instructing this Honorable Court as to how this case must be decided, and threatening that if it is not decided as they want it, that they will go before the Congress and see that the law is fixed so as to allow them to carry on the nefarious scheme in hand; as evidenced by the following from Collier's under date of January 28, 1911:

"AN IMPORTANT CASE.

'John Bull' observed the 'British Medical Journal' for all his boasted common sense and hatred of humbug, is still more quackridden than any member of the human family, except his cute Cousin Jonathan.' There is now before the Supreme Court of our country the case of the United States vs. O. A. Johnson, which is to decide whether doctor (or is it professor?) Johnson shall be allowed to sell his 'Mild Combination Treatment of Cancer' with labels elaborating the false statement which the name implies. If the court decides that Congress, in the Pure Food Act, failed to do what it thought it was doing, an amended act *will have to be passed at once*. Obtaining money under false pretenses is becoming a more difficult amusement, and some of the experts are being forced into really working for their living."

VIII.

But back to the legal question again. Since writing our original brief it has been suggested to us and we now suggest it to this court that the Constitution of the United States provides:

"Congress shall make no law * * * abridging the freedom of speech or of the press."

The Food and Drug Act rests solely upon the power to regulate interstate commerce. But the interpretation of this law by the Department of Agriculture extends its provisions far beyond the regulation of commerce and into the field of theories, ideas and beliefs—a field in which freedom has always been the policy of our government.

The act makes it unlawful to ship a food or drug product from one state to another if the package or label bears any statement, design or device which is "false or misleading in any particular."

This is strong language, but entirely reasonable if applied to tangible things about which Congress was legislating and about which reasonable men seldom differ. But, when extended to include the regulation of ideas and beliefs, it violates a principle heretofore deemed fundamental.

If a believer in Homeopathy should send a package of Homeopathic medicine to a friend in another state and enclose a statement (written or printed) that the sender had been benefited by the medicine and recommends it for use under like circumstances —is it possible to believe that Congress ever intended to empower the Department of Agriculture or a Federal Court to step in and determine whether that medicine was or was not calculated to benefit the recipient; and if not to punish the sender by fine or imprisonment.

If every label, leaflet or other printed matter accompanying a food or drug package which states the manufacturer's opinion as to the therapeutic or dietetic value of the article is made subject to governmental censorship, what is that but the abridgment of freedom of speech? And, if the power to abridge the right of free speech in the matter of a printed label or circular can be deduced from the commerce clause of the constitution, what is to prevent the complete regulation of all such matters by a statute forbidding the interstate shipment of any book on therapeutics or dietetics which the department of Agriculture may find to be 'misleading' in any particular?

If the interpretation insisted upon by the Department of Agriculture is sound the logical outcome would be an act to regulate interstate commerce in all books and publications relating to health hygiene and dietetics, and to authorize the seizure and confiscation of all such books shipped from one state to another which do not conform to the ideas of the Bureau of Chemistry.

So far as executive officers by their construction of the law seek to control expressions of opinion and belief as to therapeutics, dietetics, etc., it is not only a perversion of the powers of government, but a perversion of the real purpose of Congress in the enactment of the Food and Drug Act."

IX.

The government in its brief undertakes to set out some portions of the debate in Congress in reference to the construction that was to be placed upon this bill as passed, but they have only stated extracts. We have set out in the appendix to our original brief the entire proceedings which took place in the senate from which it will be seen that all of the senators in the discussion yield to the opinion that the act was not to be construed as to bring within its terms professional opinion of physicians as to the curative properties of their medicines, and we will refrain from a further discussion of that matter.

X.

Counsel undertake to contend that this court should be influenced by the construction that ought to be placed upon this act, by what the Agricultural Department has been adjudging and doing, and from pages 54 to 60 of their brief set forth what has occurred in the Agricultural Department in reference to certain cases. None of them, of course, have any application to the defendant in this case. This consists of the *ex parte* hearings that the Agricultural Department has been carrying on.

We know nothing whatever of the merits of these controversies but whatever may be the facts, it is another evidence clearly demonstrating that the Agricultural Department has been stepping beyond the bounds of its authority and attempting under the guise of some mysterious enlarged executive power, to assume the right to crucify and interfering in matters in which it has no jurisdiction; and to so conduct its affairs as to make it easier for numerous individuals to plead guilty for violation of some assumed construction of the act, when in fact they had violated no law at all, and pleaded guilty to some kind of an offense upon the theory that it was easier to do so, than to withstand the great power of the Agricultural Department and withstand the attacks of the medical profession organized as a great political power. Doubtless many of these people have been overawed by the assumed power which this department has been attempting to exercise. But what boots it, that this department presided over by the allopathic profession, may have perhaps intimidated hundreds of people throughout the country. It is this very autocratic power that is bringing into disrepute among the thinking people of the country the assumed jurisdiction of these departments, in matters in which they have no jurisdiction whatever, demonstrates as has often been said, that this departmental authority may run riot, and enforce narrow preconceived ideas of its own, and override every provision of the Constitution of the Union, and indeed, it would appear that many of these departments clothed with a little brief of authority, assume that they are greater than the courts of the country, and under a

limited license, innocent and proper in its inception, construed it so as to justify the exercise of autocratic power. It is this class of things which the government in its brief is citing that we are attacking in this case. Indeed, we are rapidly coming upon a time when the department will seek to advise the courts as how the rights of people are to be disposed of and how the laws must be construed.

XI.

We note in the Government's Brief on page 60 that they suggest that "wherever the question has arisen under the similar state laws this section in most states, almost identical with Section 8 of the Federal Law, has been always construed by the administrative authorities as prohibiting false, fraudulent, or misleading statements as to curative properties."

Again we may say we will concede to the government that wherever state administrative authorities made up of state Boards of Health dominated by the old line profession have acted, that they have been construing the law no matter how it may read, in such a way as to try to cut out all other professions or schools of medicine that may conflict with their own views.

It is suggested by counsel for the government on page 69 of their brief that "the law of malpractice holds a physician to that degree of skill and learning which is possessed by the average member of his profession." With this proposition we agree, but it is entirely a different thing to hold a party liable for damages for an opinion given to his patient, than to justify a law which attempts to make it a *crime* for the physician to give

that opinion. The defendant's liability to his patient for representing that a thing may or may not cure is one that may be righted by a civil action for improper treatment, but has it ever been, until now contended that that same state of facts which would constitute an action for malpractice founded upon a physician's erroneous opinion or view, was to be made a criminal offense as long as he is authorized to practice the profession under the laws of his state. The proposition that a physician shall be held liable to his patient in malpractice is wholly outside this discussion.

Counsel further quote from the decision of Lord Justice Bowen on page 69 of their brief wherein he stated, pertaining to an action for false representation that:

> "The state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of man's mind at a particular time is, but if it can be ascertained, it is such a fact as anything else. A misrepresentation as to the state of a man's mind is therefore a misstatement of fact."

In reference to this we have but to suggest that it is certainly true in actions for fraud that the jury may determine the question under all of the facts in the case as to whether the party intended to commit a fraud or not, but when we have a physician dealing in a question of science, and authorized as a physician, to deal in that question, and to express his opinion upon the subject, it never can be a crime for him to be mistaken in that opinion.

The government in its brief at page 70 cites a large list of authorities to sustain the proposition that "theo-

retically matters of opinion or state of mind are not exempt from the notice of the law."

With this proposition stated as a general one we have no quarrel. But that is not the question here at all. It is true that in all questions of civil rights and enforcement of contracts and breach of contract, that these matters may be enquired into, and are subject for decision upon the facts in the case, but none of such authorities have any application whatever to the question here. The question here is one of scientific opinion, investigation, qualification and study upon the subject, and one which the law recognizes as a science, and one in which it has by license delegated to the graduated members of the medical schools, a right of expression of opinion, and the right to deal in opinion and to express his opinion upon his experience on this scientific subject, and the authorities of such character as cited in the brief are wholly beside the question.

In conclusion we may observe that the question for this court to decide is the one raised on the demurrer to the indictment and the construction to be placed upon this act, and our answer to the government's brief in reference to magazine articles and publications, is invited only by the fact that the government is attempting to try the case of fact upon magazine articles.

It may be within the line of propriety to attempt to "magazine" the Legislatures, the Congress, and Agricultural Departments, but we had scarcely expected that the government would enter into the practice of attempting to "magazine" the Supreme Court of the United States.

We respectfully submit that the Government's contention in this cause cannot be sustained, and that to sustain it would, by construction, open a field that must eventually destroy the usefulness of courts altogether, and result in turning a wise and beneficial piece of legislation when fairly construed, into an engine of destruction, destroying fundamental rights of the citizens, and throwing open the gates of cavil and strife, and multiplying the opportunity for discord and turmoil between the various schools of medicine of the country which the Congress could never have intended.

Respectfully submitted,

JAS. H. HARKLESS,
CHAS. S. CRYSLER,
CLIFFORD HISTED,
Counsel for Defendant in Error.

Dated February ...., 1911.

ADDITIONAL APPENDIX.

Inasmuch as the government in its brief has gone into statements of magazines and other newspapers in reference to the opinion of alleopaths on cancer cure we herewith submit the testimony taken in the trial of the case of the case of State Board of Health of Missouri vs. Dr. O. A. Johnson where the State Board was suing to revoke defendant's license on the ground that the same medicines mentioned in this indictment was ineffective in the cure of cancer. That case was fully tried out before Hon. Henry L. McCune, Judge of the State Circuit Court at Kansas City, and resulted in a vindication of Dr. Johnson's cure of cancer. The testimony, together with opinion of the judge and final decree are as follows:

In the Circuit Court of Jackson County, Missouri, at Kansas City. Division No. 4, April Term, 1908. *Board of Health of State of Missouri, Plaintiff, vs. O. A. Johnson, Defendant. No.* 34699.

TRANSCRIPT OF PORTIONS OF TESTIMONY.

On the 11th day of May, 1908, and at said April term, 1908, of said court, this cause coming on to be heard before the Honorable Henry L. McCune, judge of said court, the plaintiff appearing by its attorneys, Messrs. Walsh & Morrison and Ewing C. Bland Esquire, and the defendant appearing by his attorneys, A. R. Strother, Esquire, and Messrs. Harkless & Histed, the following among other testimony was introduced:

The plaintiff, to sustain the issues upon its behalf, offered evidence oral and documentary in the words and figures following:

The hearing of this cause was here adjourned until the following morning at 9:30 o'clock.

Kansas City, Missouri, May 12th, 1908.

The hearing of this cause was here resumed pursuant to the foregoing adjournment. Present as on the preceding day.

DEFENSE.

Thereupon the defendant, to sustain the issues upon his behalf, offered evidence oral and documentary in the words and figures following:

PEMBROOK McCOMAS, called as a witness on behalf of the defendant, having been duly sworn, testified as follows:

Direct Examination by Mr. Harkless.

Q. Mr. McComas, what is your name? A. Pembrook McComas.

Q. What is your given name? A. Pembrook.

Q. How old are you? A. Seventy-four; will be seventy-five the 8th of August, if I live that long.

Q. Where do you reside? A. In Edgerton, Platte County, Missouri.

Q. Edgerton, Platte County, Missouri? A. Yes, sir.

Q. That is over east of Leavenworth on the Missouri side? A. Well, it is pretty near right directly north of here. I am right close to the upper end of the county and on the east side of it.

Q. Mr. McComas, did you ever suffer with a cancer? A. Well, I suffered with something.

Q. Where was it? A. It was right there on my face (indicating).

Q. On the cheek? A. Yes, sir.

Q. Upper cheek? A. Yes, sir.

Q. Left one or right one? A. Right one.

Q. Just turn around to the court and let the court see. Point out where you say it was.

Witness here indicates upon his face the location of the trouble.

Q. You can see the scar, I suppose?

The Court: Yes.

Q. Now, how long had you been suffering with that before you were treated by Dr. Johnson? A. Well, it had been coming on me gradually for about six years; but it had not bothered me much only about the last year, or such a matter.

Q. Gradually got worse? A. Yes, sir; it would scale up an dthe scale fall off and then bleed.

Q. And did it constantly get larger? A. Yes, sir.

Q. Did you go to your physician? Did you have a physician examine it? A. Yes, sir.

Q. Up there? A. Yes, sir.

Q. Who was? A. Dr. Patterson.

Q. Where does he live? A. He lives in the same town—Edgerton.

Q. Is he a practicing physician there? A. Yes, sir.

Q. What is called the old school business? A. Yes, sir.

Q. Allopath? A. Well, I don't know whether you'd call him allopath.

Q. Well, one of the old fellows? A. Yes, sir; one of the old style; doctors a good deal with calomel and quinine, and I suppose a little whiskey once in a while.

Q. Now, then, you got an allopath. I wish you would state to the court—now, after this gentleman examined you what did he say he could do, if anything, or what could be done with it?

Mr. Bland: That's objected to as incompetent, irrelevant and immaterial.

Mr. Harkless: I think he has a right to state what the doctor told him it was.

The Court: I will sustain that objection as being hearsay.

Mr Harkless: Does Your Honor mean to say that he cannot say that he had it examined, and as to what it was?

The Court: He can say he had it examined.

Mr. Harkless: But cannot state what the doctor advised him it was?

The Court: I don't see why that is not hearsay.

Mr. Harkless: That is not within the hearsay rule at all. That is the only way we could find out about any disease. Nobody knows what it is.

The Court: Yes, but the doctor could come here and tell what it was, and relieve him of the unpleasant duty of saying what the doctor said.

Mr. Harkless: Well, I offer to prove by this witness, now, that he had it examined and what the doctor told him it was.

The Court: You can prove that he had it examined.

Mr. Harkless: Well, he has already sworn to that, and so I offer to prove now what he learned as to this was from his family physician.

Mr. Morrison: We object to that as hearsay.

The Court: The objection will be sustained.

Defendant excepted.

Q. What did you afterwards do? A. Well, a short time after I went to see that doctor I came down here to Dr. Johnson.

Q. Yes. Well, did you have it examined here? A. Yes, sir.

Q. And what was it pronounced to be, here? A. Dr. Johnson pronounced it a cancer.

Mr. Harkless: I suppose that is hearsay, too.

Q. Well, what did you do then? A. Well, I came down here and was treated until it was taken out.

Q. And how long did he treat you? A. Well, he got it out in a little over two weeks, and then I went home, then.

Q. Now, about how long was it? A. Well, I think it was about fifteen days, maybe, or sixteen.

Q. Now, then, Mr. McComas, just state to us how it came out and in what form. What was it? A. Well, it just come out in a little chunk, like it was almost as large around then as a half dollar, and I suppose as thick as two half dolars maybe, when it was taken out.

Q. Have you got it with you? A. Yes, sir.

Q. Let's see it. A. Here it is. It has gone down wonderfully since it was taken out, because it has been put up there over three years (exhibiting an object before the court).

Mr. Harkless: We now exhibit that to the court, and we will have testimony here as to what it is.

Q. How long has that been in there? A. Been in there a little over there years.

Q. In the alcohol? A. Yes, sir.

Q. And kept in your possession all the time? A. Yes, sir.

Q. And that is the same animal that was taken out of your face? A. Same thing that was put in there about three years ago, about the 2nd of May, I think.

Q. How does it compare in size now with what it did when it was taken out? A. Well, it is not much more than half as large now.

Q. As it was then? A. Yes, sir; it has been showed a great many times.

Counsel for plaintiff here offered in evidence a bottle containing the matter referred to by the witness, which bottle was identified as Exhibit "1."

Q. Now, I wish you would tell the court just how this thing acted before you commenced operating on it and had it taken out? A. Well, when it first began to show on my face it just seemed like a little dry scab; and after it had been there some two or three years it would begin to fall off, and finally it got to bleeding a little every time that it would come off, and that is what got me started out to looking after it.

Q. Well, did it gradually keep getting larger? A. Yes, sir; kept spreading and getting a little larger all the time.

Q. Did you have itching and pain with it? A. Yes, sir; did not pain so much as it itched.

Q. Any sharp shooting pains in it? A. Once in a while.

Q. Once in a while it would have that in it? A. Yes, sir.

Q. Now, how large was the hole left there in the face when that came out? A. Oh, I suppose it would have taken about that part of my thumb to have filled it out (indicating on his thumb).

Q. Well, as big as the whole of the top of the thumb from the first joint up? A. Yes, sir; it was quite a time healing up.

Q. About how long did it take to heal that scar tissue there before it was healed up? A. I think it was about five or six weeks.

Q. Five or six weeks in healing up? A. Yes, sir.

Q. Now, you have had no trouble with it since? A. None at all.

Q. How long did you say it was in healing up? A. About five or six weeks.

Q. How long ago was it this operation took place? A. Three years. I went there about the 20th of April, and I got home the 2nd or 3rd day of May. That is, it was taken out about that time.

Q. Now, did you state how long you were here? A. I was here about fifteen or sixteen days.

Q. Then did you go home, and was it afterwards healed up at home or completed? A. Yes, sir; I was back, though, once during the time; after I had been there about two weeks, I suppose, or three, I came back.

Q. How long did you stay that time? A. I didn't only just come and go back home that day.

Q. And that was the last time you have been back? A. Yes, sir.

Q. Why did you come back the second time, Mr. McComas? A. Why, I came back for him to examine it and see if it was healing all right. I had taken medicine with me to put on it.

Q. Did he say whether it was healing all right? A. Yes, sir; he said it was getting along all right.

Q. Now, how long did you use that treatment after you went away? A. Why, I used it, I suppose—a blood medicine and a salve—about five weeks, maybe a little longer.

Q. About five weeks after? A. Yes, sir.

Q. Now, was that something you took internally—the liquid? A. Yes, sir; the liquid was.

Q. And the other was something else to put on? A. Yes, sir; a salve to put on, and had it washed every day.

Q. And it healed rapidly or gradually, or how? A. Well, it didn't seem to heal extra fast. Of course, I wouldn't expect it to heal right fast, because I was getting up in years pretty well at that time.

Q. But it just gradually closed up? A. Yes, sir.

Cross-Examination by Mr. Morrison.

Q. How long did you say you had been bothered with that? A. Well, it was about six years before I had anything done with it—but for three years it did not seem to bother me any, hardly.

Q. Six years was the limit of it—— A. (interrupting) Yes.

Q. You didn't have it seven years? A. No, I didn't have it seven years.

Q. And is that your picture (showing witness a picture)? A. I guess it is, but it don't like a very good likeness.

Q. You are the man "P. McComas," of Edgerton, Missouri? A. Yes, sir.

Q. That is you? A. Yes, sir.

Q. But you did not have a cancer of seven years' standing? A. About six years, I suppose, from the time it first began to come on my face. It didn't bother me much for about three years.

Q. This was a little scale, or something like that, there on the skin at first? A. Yes, sir.

Q. And you could pick it off? A. Just a scale, and it would kind o' raise up and I could pick it off, and finally it got to itching, and then it would bleed.

Q. And finally it got so there was a running sore there? A. Yes, sir.

Q. Right in the skin, wasn't it? A. Well, it went down in the flesh considerably.

Q. Well, there isn't much flesh right there. A. Well, it seems like there was right smart, when it came out.

Q. Well, when he put this paste on it—he put kind of a paste on it that kind of burns and smarts, didn't he? A. Well, when it was first put on in the morning it generally smarted a little for a while.

Q. And how many times a day did you put that paste on? A. He dressed it twice a day.

Q. Twice a day? A. Twice a day, as long as I was there.

Q. And how much did you pay him? A. Sixty-five dollars, I believe, was the bill.

Q. And how many weeks were you being treated? A. Well, I was treated here a little over two weeks, and then had home treatment about four or five weeks—five weeks, I reckon.

Q. And you took a blood medicine too? A. Yes, sir.

Q. What was the matter with your blood? A. I don't know; I am not a doctor; I couldn't tell.

Q. What other medicine did he give you to take internally? A. He didn't give me only this bottle of medicine, he said was blood medicine to cleanse my blood; and then I used a salve.

Q. Now, when you went to see Dr. Johnson what was the first thing he did for you—or, I will ask you in the first place, how did you happen to go to Dr. Johnson? A. Well, I seen some man that had been down here that they claimed had a cancer on his neck.

Q. Well, did you see his advertisements in the paper? A. No, sir; I never seen no advertisements.

Q. You came down through some other man? A.

Yes, the man told me he had been down here and had been treated and his was well.

Q. Now, where did you go? Where was his office when you came down here? A. Well, it was up on Ninth Street and Broadway, I believe.

Q. You went to his office there? A. Yes, sir.

Q. At Ninth and Broadway? A. I think it was Ninth and Broadway.

Q. And whom did you see? A. I seen Dr. Johnson.

Q. This man sitting here? A. Yes, sir.

Q. In his private office? A. Yes, sir.

Q. Now, what did he say to you? What did he do? A. Why, he told me it was a cancer.

Q. Well, did he just tell you it was a cancer as soon as he saw it? A. Well, in a very little bit after he looked at it.

Q. What did he do before he told you it was a cancer? A. Well, I don't know as he done anything particularly at all.

Q. Did you sit down? A. I just sat down and let him examine my face.

Q. What did he do? What kind of an examination did he make? A. He just turned my head to one side and looked at it.

Q. Just looked at it? A. Yes, sir.

Q. That is all? A. That is all—then.

Q. And he told you it was a cancer? A. Yes, sir.

I went back home then, and came back, I think, in about two weeks, maybe, to get him to treat it.

Q. When was the first treatment he gave you for this? A. The first treatment was about the 20th of April, 1905.

Q. Now, from the time you first went to him until this treatment on the 20th of April, did he do anything for you at all? A. Nothing, only gave me this liquid medicine.

Q. Were you taking that during the interval—— A. (interrupting) No, sir; not while I was away I was not.

Q. Now, when you went there that first time did he have a microscope? A. I don't think he did.

Q. He did not have any kind of a glass, or anything; just looked at you with the naked eye? A. I think so.

Q. And when you went back did he ever use a microscope on that? A. No, sir; not that I know of.

Q. And when you went back on the 20th of April he began putting on this paste, did he? A. Yes, sir.

Q. And he put that on twice a day? A. Twice a day until the lump came out.

Q. And when did he give you this medicine to take internally? A. Well, I was taking that all the time, then.

Q. That is, after the 20th of April? A. Yes, sir; I commenced taking that right at the start.

Q. And after those two weeks or about two weeks that he treated you and you went away, what sort of

medicine did you have then? A. I had the same kind, I suppose, and kept it up until it healed up.

Q. Some of that paste on it? A. No, sir; I never put any paste on it. Just washed it——

Q. (interrupting) After he took out this core that you have in the bottle, there was never any more paste put on? A. No, sir; never any more paste put on—only to wash it out with soap.

Q. Now, that that you have there in that bottle, who put that in the bottle? A. Dr. Johnson.

Q. What is that liquid it is in? A. Well, I suppose it is alcohol; I don't know.

Q. Where did that liquid come from? A. Well, I couldn't tell that either.

Q. Did Dr. Johnson get it some place? A. I suppose so. He just got this little bottle and put this lump in.

Q. Where did he get the liquid; where did he get the alcohol, if it is alcohol? A. I couldn't tell you that.

Q. Did you see him get the alcohol? A. No, sir.

Q. Did you see him get the bottle? A. No, sir. He brought the bottle out right there in his office, and just after he taken that out of my face, he just put it in the bottle—lifted it out with a small instrument of some kind, and I don't know what.

Q. What did you do with it? A. He just set it in my hand, and I took it home with me and kept it ever since.

Witness excused.

HENRY HOLLRAH, called as a witness on behalf of the defendant, having been duly sworn, testified as follows:

Direct Examination by Mr. Harkless.

Q. Where do you reside? A. Sweet Springs, Missouri.

Q. How long have you resided down there? A. About nine years.

Q. What business are you in down there? A. I am farming.

Q. And how long have you been farming there? A. About nine years.

Q. Where are you from there? A. I used to live at Jefferson City.

Q. What business were you in at Jefferson City? A. I was farming there.

Q. Now, Mr. Hollrah, I will ask you if at one time in your life your were suffering from cancer? A. Yes, sir.

Q. Where?

Mr. Morrison: If Your Honor please, I move to strike out that last answer as an improper conclusion of this witness, he not being shown to be qualified on this subject.

Objection overruled; plaintiff excepted.

Q. When was it, Mr. Hollrah, that you had this? A. Well, the first trace I discovered of it has been about seven years ago.

Q. How long ago was it that you were treated for it? A. About four years.

Q. Whom were you treated by? A. Dr. Johnson.

Q. Here in Kansas City? A. Kansas City, yes, sir.

Q. Now, Mr. Hollrah, I wish you would go back again to this matter, and tell us all about the history of this case, and up to the time you came up here, and how it started, and all about it. A. It started with a little blister on my lip.

Q. In the first place it was on the lip? A. On my lip—lower lip, on the left side. It started in the nature of a pimple or blister, and it kept increasing in size, and I had it examined by different doctors, and they told me that I had a cancer.

Mr. Morrison: I object to that.

Mr. Harkless: I propose to follow this up by showing that he communicated all this information to Dr. Johnson, which he must know in order to treat the case, and it is admissible and competent for that purpose, because they have to have the history of the case.

The Court. You mean Dr. Johnson cannot tell whether it is a cancer or not without finding out what some other doctor said about it?

Mr. Harkless: No, No; but how long he treated it and how he treated it, and who treated it—by what other physicians.

The Court: That is all right; but the objection is to what the doctors told him it was. That, of course, is hearsay.

Mr. Harkless: I insist that that is proper.

The Court: I will sustain the objection to that part of the question.

Defendant excepted.

Q. Well, go ahead and tell us what you did or tried to do for it.? A. Well, Dr. Latham and Dr. Jackson of Latham, Missouri, told me I had cancer.

Mr. Morrison: I object to that and move that it be stricken out.

The Court: Yes; that will be stricken out. I don't want to know what they told you it was, but what they did.

Q. Well, these doctors you speak of, what did they treat you for?

Mr. Morrison: I object to that for the same reason.

Objection sustained; defendant excepted.

Q. Well, did they treat you? A. Yes, sir.

Mr. Morrison: I object to that. I don't think it is material how many doctors treated him.

The Court. Well, I will let him tell that.

Q. Well, did they treat you ? A. They treated me, yes.

Q. Did they treat you for this on your lip? A. Yes; they treated me for that on my lip.

Q. Now, how long had they been treating you? A. About eight months.

Q. Well, now, just tell us what was the condition of it and how it appeared during the time this treatment was going on? A. Well, the condition of it seemed to be that it was not getting any better.

Q. Well, how did it appear? A. Well, it appeared indurated.

Q. Well, did it spread any on the lip? A. It spread on the lip, yes, sir.

Q. How long were you under the care of these physicians? A. About eight months.

Q. Are they physicians at your local town? A No, sir; they were physicians over at Latham, Missouri.

Q. Did you go over there? A. Yes, sir; I stayed there eight months.

Q. You stayed there eight months? A. Yes, sir.

Q. And they treated this on your lip? A. Yes, sir.

Q. About how often were you treated there by them? A. Well, I was treated with the X-ray light.

Q. About how many treatments? A. I had a hundred and sixty-eight exposures.

Q. To the X-ray light? A. Yes, sir; to the X-ray treatment.

Q. Well, were these regular practicing physicians? A. Yes, sir.

Q. Well, now, what other treatment did they give you? A. Well, they put on an application. Of course I couldn't tell what it was. It was kind of a burning application in connection with it.

Q. What is that? A. I say a burning application in connection with it.

Q. Now, what did you pay those fellows?

Objected to by plaintiff.

Mr. Harkless: You have been asking it as to our client.

Mr. Morrison: I have certainly a right to ask what this doctor exacts for his form of treatment. That has been shown. What he paid for the other treatment, I think, is entirely immaterial.

The Court: There is no objection to Mr. Morrison's question?

Mr. Harkless: Why, I have no objection to it. I thought if he wanted to know, there was no reason why he should not.

Mr. Morrison: I think there is a serious objection to all this line of questioning and proof that is being put in here. The charge in this case, as I understand it, is not that this doctor is unable to cure any simple form of cancer, or that any doctor is not able to cure a simple form of cancer; for, as I understand it, a barber or a druggist or a pharmacist, or anybody of that kind, can cure certain simple forms of cancer by proper applications, or by a sharp knife, or scraping it out, and matters of that sort. I don't understand that there is any issue here as to that. We are taking up a great deal of time that is being absolutely wasted. There's no question of that sort here. The question here is on the extravagant claims of this gentleman. They are something unusual and marvelous. We are now going on here with a lot of these simple cases, and I understand there's no controversy of that kind here. This is not a controversy as to what other doctors did or did not do, and the fact that some doctors failed to cure this man I don't think is competent. This defendant claims to be a marvel; claims that he can cure all these diseases, cancer of the

rectum, cancer of the stomach, cancer of the liver, cancer of all kinds and forms.

The Court: Well, he has to make a start on some of these. I will sustain this objection as to what he paid these other gentlemen. It is not unprofessional to charge for medical services, and I don't think it is material what this man charged, or anybody else.

Mr. Morrison: I think it is material merely to this extent—what we want to show is that this man gets people afflicted with incurable cancer, in a stage when nothing can be done, unless possibly by certain means to prolong life, and means which this man does not apply at all, and he takes their money week after week, and takes exorbitant sums which we say is unprofessional. That was the case we made before the State Board of Health, and that is the case they are supposed to be here to meet. It is not a matter of these simple cases of skin cancer, and the testimony before the State Board of Health here shows there is nothing in that proposition.

The Court: There is nothing unprofessional in taking money for treating incurable diseases. The only thing that is unprofessional would be to make a claim to cure an incurable disease.

Mr. Morrison. Well, it is the making of a claim that he can cure these things which are incurable.

The Court: Of course that is proper matter of inquiry; but the fact that he charged money for curable or incurable diseases certainly could not be said to be unprofessional. Doctors all do that; they all charge for their services. They don't take cases on contingency, as a rule, but they charge for what they do.

Mr. Morrison: That is true; and of course it is true that a doctor could, in a proper case, undertake to cure a man; but to treat a man who is incurable and whom he knows is incurable; and making a business of treating people with incurable diseases and taking their money——

The Court: You are discussing something that is not before the court. Let us go on.

Q. Now, Mr. Hollrah, after you had quit treating with these gentlemen you speak of—these physicians—where did you go? A. I came to Kansas City.

Q. Now, I wish you would state, Mr Hollrah, where the cancer was, now, on your face? A. It was on my lower lip on the left side.

Q. On the left side on the lower lip? A. Yes, sir.

Q. Now, how large had that developed to be when you came to Kansas City? A. Well, it was indurated—oh, well, I suppose, about the thickness of my finger clear across the lip.

Q. Well, could you close your mouth with it? A. Well, yes, I could.

Q. That is, you closed on it? A. Yes, sir.

Q But you think the thickness of it was nearly as thick as your finger? A. Yes, sir; it was.

Q. Now, what was the condition as to its length? A. Well, it extended about two-thirds of the way across my lip from one corner of the mouth to the other..

Q. Now, just raise your moustache there so you can show the court where it was. A. Here (witness here exhibits his mouth to the court).

Q. On the left side? A. On the left side, yes, sir.

Q. Now, I have forgotten of how long standing you say it was. A That was about seven years.

Q. Been there nearly seven years? A. Nearly seven or eight years.

Q. Had you been treated for it off and on? A. Well, four years ago I commenced treatment here in Kansas City, but prior to that I treated with the X-ray all of eight months, and prior to that I took little different medicines from doctors right at home, what they recommended for me to use.

Q. Now, were these doctors that you went to, well known physicians up there? A. Yes, sir.

Q. Where was it you took the X-ray treatment? A. That was at Latham, Missouri—Moniteau County.

Q. What was your general physical condition when you finally came here to Dr. Johnson's place? A. Well, I think it was moderately fair.

Q Well, but with reference to the condition of this lip? What odor, if any, did it give off, or smell? A. Well, I don't know as it give a very offensive odor.

Q. But you could smell it, though couldn't you? A. Yes, sir.

Q. Now, what had been its condition from time to time in the way of breaking out or closing up and coming again, or a scab coming off of it? A. Well, it would form a scab, to a certain extent, and then it would come off, and then it would irritate and bleed.

Q. And it would bleed? A. Yes, sir.

Q. Now, when it first commenced—when the thing first started on you, what was the first sensation that you had? A. Well, the first sensation it formed a growth there about the size of a grain of shot, and there was kind of a crawling sensation.

Q. Itching? A Itching, yes, always.

Q. Always itching? A. Yes, sir.

Q. Were you irritated? A. Yes, sir.

Q. I will get you to state if you would occasionally have some very severe shooting pains through it at times.

Mr. Morrison: That's objected to as leading.

Question withdrawn.

Q. Just state to the court what there was with reference to the condition of the pains. A. Well, the pains were there, but they were not very serious; but there was always more or less pain.

Q. Now, this itching that you speak of, how long did that keep up? A Well, that was continual.

Q. Continual itching? A. Yes, sir.

Q. Now, when you came to Dr. Johnson did he inquire of you about how old you were and what your condition was, and inquire into your general health?

Mr. Morrison: I object to that as leading.

A. Yes, sir.

The Court: Well, he has answered it.

Q. Just go ahead and tell us all that he talked about. A. Well, he examined me.

Q. What did he ask you about your age and your condition and who treated you, and all these things? A. Well, he asked me different questions in regard to the

case. Of course I don't know that I could repeat them: it has been quite a while. I don't remember them exactly.

Q. Well, did he ask you about your treatment—how you had been treated?

Mr. Morrison: That's objected to as leading.

Q. Did he ask you anything with reference to that—whether you had been treated for it? A. Yes, sir

Mr. Morrison. I object to that as leading. I think this witness ought not to be led, especially after he says he don't know what he was asked.

The Court: Don't lead him, Mr. Harkless.

Q. How long were you treated there, Mr. Hollrah? A. At that place, for eight months.

Q. I mean speaking of Dr. Johnson's place? A Five weeks at Dr. Johnson's place. I was really there six weeks; but he put in five weeks actual treatment.

Q. Now, then, when that came out or off, how did it leave the lip? A. Well, it left it—two-thirds of it clear across, you know, was gone

Q. Exposed the teeth? A. Yes; it exposed the teeth.

Q. And how did it finally come out? Just give the court, now, the sensation, how it finally developed and came out. A. Well, it sloughed out by the method of the treatment. It just finally sloughed out.

Q. Just kind o' fell out? A. Yes, sir; gradually.

Q. Well, then, it has gotten healed up now so that it is well now, isn't it? A. Yes, sir; it is.

Q. Never given you any bother since? A. None at all.

Mr. Morrison: I object to that as leading.

Q. Now, after this did you go home, back to your place? A. Yes, sir.

Q. And did it finally heal up? A. It was healed up when I arrived at home.

Q. And it has remained so ever since? A. And it has remained so ever since.

Mr. Morrison: I object to that as leading.

Q. How old are you, Mr. Hollrah? A. I am fifty-six.

Q. Are you a man of family? A. Yes, sir.

Q. Now, how did you come to come up here? A. Why, I was recommended by a friend at Jefferson City who gave me a letter—who wrote me a letter. He had been cured by these people——

Mr. Morrison: I move to strike that out.

Q. Well, he has been treated by them? A. He had been treated by them.

Q. For cancer?

Mr. Morrison: I object to that.

Q. Well, what had he been treated for? A. Well, he was treated for a trouble on his lips.

Mr. Morrison: I object to that.

The Court: Don't state, unless you know of your own knowledge.

Mr. Harkless: I want to state to the court that I don't accept and proceed on the theory that the statement that any gentleman shall make upon the stand, either layman or doctor, is any evidence that it is cancer. Now, I will admit it is all in the air, and nobody knows anything about it. I don't expect when he uses the

term, that it is going to preclude proof of the fact that it is not; and when your physicians say it is not cancer, I understand that that is their opinion about it.

Mr. Morrison. It is real nice for Mr. Harkless to say that we are not precluded; but it would be pretty hard for us to write a letter down to Jefferson City and find out the condition of the gentleman.

Q. Well, anyhow, he told you to come here?

Mr. Morrison: I object to that as incompetent, irrelevant and immaterial.

Mr. Harkless: Well, they will have some of these questions, too. I am going to insist on it if they object.

Q. Now, when you started up here what place did you live? A. I lived at Sweet Springs.

Q. Well, what occurred the evening you left to come here?

The Court: We will adjourn this matter until tomorrow.

The further hearing of this cause was here adjourned until the following morning, Wednesday, May 13th, 1908, at 10:30 o'clock.

Kansas City Missouri, Wednesday, May 13th, 1908.

The hearing of this cause was resumed pursuant to the foregoing adjournment. Present as on the day of adjournment.

Testimony of Henry Hollrah continued.

Cross Examination by Mr. Morrison.

Q. Mr. Hollrah, have you a little lump there on your throat on the right hand side? A. No, sir.

Q. Do you feel any up above there right on the gland? A. No, sir.

Q. This trouble you had started with a little blister or pimple? A. Something like that, yes, sir.

Q. Here on the front of the lower lip, wasn't it? A. On the lower lip on the left hand side.

Q. And it grew right along the front of the lower lip there, on the left side? A. Yes, sir; and it extended right across the corner.

Q. It extended right across on the front of the lower lip? A. Yes, sir.

Q. Now, you came up here to this institution of Dr. Johnson's. Where was it located at the time? A. On Ninth and Broadway.

Q. And did you see Dr. Johnson when you came in? Was he the first man that you saw? A. Yes, sir.

Q. I believe you stated yesterday that you don't remember the questions he asked you? A. Well, I don't remember just exactly the questions he asked me.

Q. And he did look at this sore place, did he? A. Yes, sir.

Q. And did he start right in treating it? A. Well, he examined it.

Q. What do you mean by examining it? A. Well, that is, he looked at it, and he told me that he could cure it, and he told me what the charges would be.

Q. And what was that? What were the charges? A. The charges?

Q. Yes. A. Well, they were twenty-five dollars a week for the treatment.

Q. How many weeks were you there? A. Five weeks.

Q. And what was the first thing he did in the way of treating you? A. Well, he put on medicine.

Q. Did it burn? A. No, sir.

Q. Did it smart? A. Not the first two or three days.

Q. After that did it burn? A. After that—yes, it did.

Q. And burned considerably too, didn't it? A. Well, at times.

Q. And this sore, now, was on the front of the lip, wasn't it? A. Well, it extended over the lip entirely all the way along.

Q. On the front side? A. No, not really on the front side; on the center of it—across.

By Mr. Harkless.

Q. On top? A. Yes; on top.

Mr. Morrison: I object to any suggestions from Mr. Harkless.

Mr. Harkless: Well, then, I will withdraw it.

By Mr. Morrison.

Q. The soreness or there was inflammation there, wasn't there? A. Well, there was a soreness; it was in a raw condition, and there was an induration there, about the size of my finger; I expect, or maybe larger, extending clear across.

Q. By induration you mean something hard? A. Well, an induration as the doctors explained it to me, meant a swelling; and then there was openings——

Q. (interrupting) Now, on the inside——

Mr. Harkless: Let him finish.

A. (continuing) There was openings there, several cavities.

Q. Where were the cavities? A. Right here in the center of the lip, and ranged down.

Q. Ranged down on the outside? A. Well, no, in the center of the lip.

Q. Well, I say ranged downward on the outside of the lip? A. Yes, on the outside of the lip; not on the inside, but right through the center of it downward.

Q. In other words, this sore part or raw part was outside of your mouth when you closed your mouth? A. Well, it was on top of the lip—extending clear across from this corner, right corner, of my mouth across to the left.

Q. And when you closed your mouth the raw part was on the outside? A. Yes, sir; it was on the outside and on top of the lip.

Q. Well, it was on the outside? A. Yes.

Mr. Harkless: And on top of the lip, he said. I just don't want you to misstate the witness.

Q. The treatment he gave you, this burning treatment, after a while caused the tissue there to slough away, I believe you stated? A. Yes, sir.

Q. Now, ultimately the whole lip for two-thirds of the way along— A. (interrupting) Yes, sir.

Q. (continuing) Came away, didn't it? A. Yes, sir.

Q. Clear through to the inside of the mouth? A. Yes, sir.

Q. So that the whole top of the lip was finally burned out by this medicine, wasn't it? A. Yes, sir; it was.

Q. And it came off clear through to the inside, didn't it? A. Yes, sir; it did.

Q. So that the effect of it was just as though you had taken a knife and cut off the top part of your lip there two-thirds of the way across, wasn't it? A. Yes, sir.

Q. And for a space as far down as the width of your two fingers? A. Well, I don't know whether it would be as wide as two fingers; it would be, of course, the width of one finger.

Q. Well, your fingers are pretty broad—perhaps broader than mine; but the same as if you would cut the lip clean away for that two-thirds of the way along there? A. Well, there was enough down there so that it exposed my teeth like it does now (illustrating).

Q. And cut it away clear through slick and clean to the inside? A. Yes, sir.

Q. Now, sometimes this paste burned very considerably, didn't it? A. Yes, it burned considerably.

Q. And were you taking this so-called mild combination treatment? A. I don't know anything about what they called the treatment.

Q. You don't know whether you were taking what was called "Dr. Johnson's mild combination treatment" then, or not, do you? A. No, sir; I do not.

Q. Now, of course you are not a cancer expert, Mr. Hollrah? A. No, sir; I am not.

Q. And you don't know what this sore was except as other people told you? That is correct, is it? A. Yes, sir.

Q. And you have told us the extent of the examination that Dr. Johnson made when he saw you and started to treat you? A. Yes, sir.

Q. And it consisted merely of asking you these questions and looking at you? A. Yes, sir.

Q. That is all that he did? A. Yes, sir.

Re-Direct Examination by Mr. Harkless.

Q. Did he go into a statement of how old you were and how long you had been laid up? Dr. Johnson asked you those questions? A. Well, I suppose he asked me those questions; but I couldn't recollect positively, but something on that order.

Q. And whom you had doctored with? A. Yes, sir; he asked me.

Q. And what they said about it? A. Yes, sir.

Q. Now, did you tell him what these physicians decided about it when you asked him to treat you? A. Yes, sir.

Q. What did you tell him?

Mr. Morrison: I object to that.

The Court: I think you went over that yourself.

Mr. Harkless: Not on this line.

Q. What did you tell him as to what they had done with it?

The Court: It might be material, possibly, that he told him what the other doctors had said; but I don't think he has a right to detail that here. It is proper for him to say that he told Dr. Johnson what the other doctors had told him; but what that was, I don't see how that is material here. That would be just an indirect way of getting into this case the hearsay as to what other doctors said, which I excluded yesterday. I don't care anything about what other doctors said about it. That is, I don't want to know it in this way, because it is hearsay.

Mr. Harkless: Now, I want to make this suggestion to the court. It is not a question of hearsay testimony; it doesn't come within that rule and is not offered for that purpose. The cross examination of the witness developed that they thought he had not made a sufficient inquiry into the case.

The Court: How is that?

Mr. Harkless: The cross examination of my distinguished friend here indicated that he ought to have inquired very carefully into the man's history as to what had been done and what had been the treatment, and so forth; and I agree with him in regard to that. Now, the very statements that other physicians have examined it and what they said and did about it, becomes as laid down by the books, an important feature connected with the other physicians, determining the general nature of it and how it ought to be treated. It is not offered for hearsay testimony at all, nor do we offer it in that capacity, nor do we offer it for the purpose of proving, as

direct testimony what the physicians had said about it, but we offer it for the purpose, and it seems to me it must go into this case, as to what was said by this patient to the physician, the defendant here, in order to acquaint him properly with the case, and aid him in the performance of his duty, by giving all the information he can get in reference to the case. It is a very important question that a physician must inquire into. He could not get any more important information in treating him than the statements of what other parties had done with that piece of work before, and what they had said concerning the matter.

The Court: I will let you show that, that he told him what the other doctors had said about it.

Mr. Harkless: He has already sworn as to that.

The Court: Yes, and that is the reason I say we have been over that yesterday.

Mr. Harkless: Yes; but the point now is whether or not we shall be permitted to show what these other doctors said and had advised as to the treatment of this case.

The Court: Suppose he says that the other doctors said that it was a cancer. Suppose I let him show that. That is what you are trying to show. Suppose I let you show that, what good is that going to do me in determining this case? If they have aided the doctor in treating him or determining upon treating the cancer; but I don't care what he was treating him for.

Mr. Harkless: Then it is unnecessary to inquire into the question of whether he asked him anything at all.

The Court: That is for you to say.

Mr. Harkless: I insist, and have insisted, on asking it from this witness——

The Court: I think I have seen the drift of this whole thing. The Board of Health claims that these things are not cancers, and now you want to show that these doctors of the old school said this was a cancer; and that is hearsay testimony. If you get those doctors here, of course their testimony is competent as experts. But whether these other doctors that treated him said this was a cancer or a tumor or an ulcer, is not going to aid this court any in determining whether this man has been guilty of unprofessional conduct or not. I think it is competent to show that he did inquire, that he took enough pains to inquire into the history of the case, and get the history of the case, and when he had it, proceeded to treat the case. Now, that's all I want to know.

Mr. Harkless: I think that is a correct ruling, except that I think this ought to be admitted as part of it.

The Court: Well, I don't want to get that hearsay testimony into the record.

Defendant excepted.

Witness excused.

FREDERICK A. SHELEY, called as a witness on behalf of the defendant, having been duly sworn, testified as follows:

Direct Examination by Mr. Harkless.

Q. What is your name, Mr. Sheley? A. Frederick A. Sheley.

Q. And you live where? A. Iowa—Northwest Iowa.

Q. What town? A. Humboldt is my county seat, or Dakota City, both in fact adjoining each other.

Q. How old are you? A. If I live until the 28th of August I will be seventy-three years old.

Q. What is your business? What has been your business? A. My business has been farming most principally. I left the farm about six or seven years ago—seven years ago, and moved to town, and kept a restaurant there until my wife died; and since that I have been living with the children. Haven't located permanently any place.

Q. Now, Mr. Sheley, did you have some trouble in the nature of a cancer at one time? A. I did.

Q. Where did you have it? On what part of your anatomy? A. My neck here.

Q. On your left neck? A. Right.

Q. Right side of your neck? A. Yes, sir.

Q. Well, about when did this commence? A. About, as near as I can get at it now, about seven years ago last fall—either six or seven.

Q. Well, it was of a good many year's standing? A. Yes; yes, longer than I wanted it.

Q. Now, how long had this been on you—coming on the side of your neck prior to the time you had it treated by Dr. Johnson? A. Between six and seven years.

Q. It has been developing for six or seven years? A. Yes, sir.

Q. Well, how was the thing getting along from the time it commenced? Did it keep getting better or worse? A. Kept getting worse.

Q. Larger? A. Yes, sir.

Q. How long was the "animal" finally when you came down here to Dr. Johnson? A. Well, it got up to be about the size of a hen egg.

Q. A regular big hen egg? A. Why, I could feel it and look at it—yes, a regular hen egg. It got to bleeding around the top of it and began to break off a little.

Q. Sloughed off? A. Yes, sir; and I went—before that, though, I had went to three doctors and I had used quite a number of their remedies that I had heard of. Some called it cancer, and some didn't and some one thing, and some another, but there was nothing done it any good.

Q. Was there finally a miscroscopic examination made of it? A. Yes, sir.

Q. Where was that made? A. Why, it was out—it was in Iowa City the State Board of Examiners——

Q. (interrupting) At Iowa City, Iowa? A. Yes, sir. The doctor cut off a little piece and—oh, it was not—just a little small piece.

Q. And examined it? A. And sent it down there, and they sent it back and said it was cancer, and I gave them five dollars, too.

Mr. Morrison: I move to strike out what they said.

Motion sustained; defendant excepted.

Mr. Harkless: What he had done, I think is competent.

The Court: I will sustain the objection.

Q. Did you get a report from the state institution? A. Yes; Dr. Graham——

Mr. Morrison: Well, now, I object to that.

A. (continuing) The doctor got a report—Dr. Graham.

Q. Do I understand you to state, now, that you got a report from the state university on this thing? A. Yes, sir; the doctor did.

Q. And what was that report?

Mr. Morrison: I object to that.

A. It was cancer.

Mr. Morrison: Wait a moment.

By the Court:

Q. Was it a written report? A. Yes, sir.

Mr. Morrison: I object to that as not the best evidence.

A. (continuing) I did not bring it; I can send and get that.

Mr. Harkless: I will get it if it is thought necessary; but I insist that this evidence is competent without it, and on this theory——

Mr. Morrison: I don't think it is admissible if you had it here.

The Court: There may be some new and unusual rules applied to cancer cases; but here is a written report, and he has it, and he says he can get it, and how in the world do you expect to show what its contents are by parol testimony?

Mr. Harkless: We are not claiming title under anything of that kind, only incidentally; and it isn't our property. It is only incident to the issues. Of course we might go into everything here. They might question whether it was certified under the Act of Congress, or something like that; but it is not in issue here, only collaterally, and I think it is competent for him to tell it.

The Witness: If my oath ain't good in regard to it, I might as well leave the stand, it seems to me.

Mr. Harkless: Well, that is another matter. They might insist that I should bring the institution here to prove that it was his signature on it.

The Court: You know the rules of evidence as well as I do, Mr. Harkless. You have got your matter in the record. Now, go ahead and try the case according to the rules of evidence.

Defendant excepted.

By Mr. Harkless:

Q. Now, Mr. Sheley, after you had seen the doctors there, you came down to see Dr. Johnson? A. I did.

Q. Now, then, just state to the court what was done here, and what you told him and what he told you while he talked to you about your case, and what was said. A. Dr. Johnson examined me, and I told him that I wanted him to tell me honestly what he thought it was, and if he thought he could cure it; and he says: "It is a cancer."

Mr. Morrison: I move to strike that out as hearsay.

Objection overruled; plaintiff excepted.

A. (continuing) And I says, "Do you think you can cure it? Will you guarantee a cure?" He says, "No, sir, I won't; but," he says, "I think I can cure it. I will do the best I can." So I says, "All right, Doc. go ahead." And he told me his terms, and we fixed it up, and he went ahead.

Q. Now, did you give him a history of your trouble? A. I did.

Q. All that you were told and what the doctors told you, and everything else? A. He inquired as to my ancestors, whether they had ever had any disease of the kind—what diseases I had had heretofore, and gave me a pretty thorough examination, I thought.

Q. Now, did you tell him about the history of the microscopical examination? A. I did.

Q. And the talk with the physicians? A. Yes, sir; and about what I had tried, to heal it.

Q. Then after that he started in treating, did he? A. Yes, sir.

Q. Now, just tell, Mr. Sheley, what was done, and what was the effect of it; how it was commenced and what become of it? A. He commenced applying medicines that I did not know what those medicines were. He used a number of different kinds.

Q. Well, but what was the result, now, when he commenced applying them? A. The result was that the cancer came out—what I called cancer, came out.

Q. Did you mean to say that just the whole thing turned out, did it? A. Yes, sir.

Q. Core and all? A. In three pieces—I think, the best I can recollect; either two or three pieces came right out. It broke up.

Q. It just kind o' come loose at the roots and sloughed out? A. Yes, sir.

Q. Well, about how large would you say it was when it came out? A. Well, it must have been two or two and a half inches or three inches, or two by three inches.

Q. And how thick was it? A. Well, I should say it was from three-quarters to an inch.

Q. Was it pretty near round shaped? A. A little oblong.

Q. Something like an egg shape? A. Yes, sir; a little more oblong; nearly three inches one way and two the other, I should judge, from the best I could see; I didn't measure it, but——

Q. (interrupting) Now, how long was he treating it, Mr. Sheley? A. Well, six weeks. I could have went home—he told me "You can go home," in four weeks, and take some medicines along to finish the healing; but I would rather stay until it was healed up, and I wanted to go home with a clean neck.

Q. And you did stay? A. And I did.

Q. How much longer? A. Two weeks—six weeks. I stayed two weeks longer than the four weeks, making six weeks.

Q. Now, Mr. Sheley, I wish you would tell the court the feeling that thing had during the six or seven years it had been on you all the way up? A. At differ-

ent times—sometimes it would itch and smart and had kind of a creeping sensation; and sometimes it seemed like a cold streak would run from it, and sometimes there would be little streaks of the pain run away up to the top of my head.

Q. Sharp darting pains? A. Yes, sir; just a little sharp streak or two like electricity almost.

Q. Did it sometimes have a scab that would come off? A. Why, it did at first; but afterwards it did not.

Q. It was ragged, was it? A. Yes.

Q. What was the appearance of that raw part sticking out on your neck? A. Pretty ugly—kind o' looked like a rose almost—ugly looking.

Q. Did it smell, too, some? A. Got to, yes.

Q. Pretty bad smell, was it? A. Yes.

Q. How long was it since you took this treatment and had it cured? A. I commenced the latter part of August.

Q. August of what year? A. August of this last year.

Q. 1907? A. Yes, sir; and went home six weeks after.

Q. Now, Mr. Sheley, I wish you would show us where that scar is on your neck? A. I will be glad to show it to anybody that wants to see it (witness exhibits his neck to the court).

Q. Just show us where it was. Just unbutton your shirt there (witness does so).

Q. I want to ask you, Mr. Sheley, what was the

condition of your general health when you came here? A. Well, I was pretty well run down. My general weight is a hundred and sixty, and I was down to a hundred and forty. I now weigh a hundred and sixty-five; the best I have done for thirty years.

Q. Well, did you commence gaining right away afterwards? A. Right away; yes, sir.

Q. And after the cancer was taken out you have felt no ill effects from it at all? A. No, sir.

Q. Does it appear now, as far as that is concerned —would you know it was there by feeling at all, if you did not know the scar was there? A. No, sir; wouldn't know it was there. Oh, once in a while it feels like there is a little drawing sensation there. I had a felon on that finger some time ago, and it feels worse today than that does. It is a little kind o' numb feeling occasionally, but there is no pain, and there is days that I don't think of it at all.

Q. What was the color of your complexion when you came here? A. Pretty brown, the best I recollect.

Q. Sallow? A. Yes, and weak.

Q. Had this weakness been gradually coming on you for all this six or seven years you had had this? A. Why, no; for the first two or three years I didn't mind it, so to speak; but after it began to get well—well, the last couple of years, or the last year, it was worse.

Cross Examination by Mr. Morrison.

Q. Mr. Sheley, this lump was down there on your neck about the junction of the neck and shoulder? A. Yes, sir.

Q. Right under the collar of your shirt and a little below? A. Yes, sir.

Q. And you began the treatment of Dr. Johnson in the latter part of August, 1907? A. Yes, sir.

Q. That is, this last August? A. Yes, sir.

Q. And you continued it for about six weeks, so that the last of that treatment was in October, 1907? A. Somewhere along there; yes, sir.

Q. Now, what was the first indication you had of any trouble there on your neck at that point? A. It was a spot about as big as my thumb nail, or maybe a little larger—and a kind of scab over it. I thought it was a ring worm, and I took some ring worm medicine and put on it and it didn't do any good, and it kept getting a little bigger and a little bigger, and just kept going on that way. I kept putting on different medicines, liniments and different treatments that fellows would tell me that they thought was good, and the doctors put on stuff.

Q. Now, when Dr. Johnson went to treating you with this medicine that he put on, did it burn? A. Not very bad, no. No, there was no burning sensation—it was kind o' more of a drawing sensation—to me.

Q. Now, how long was it from the time you first observed this little spot until the time that you went to Dr. Johnson for treatment? A. Somewheres close to seven years; between six and seven years. I didn't keep dates. I have not got the dates, but the best I can recollect and what I have been doing, it has been six or seven years.

Q. Now, this medicine he put on there smarted considerably, did it? A. No, sir.

Q. You said it was kind of a drawing sensation? A. More of a drawing sensation.

Q. Where did you put the medicine, right on the lump? A. Right on the lump; yes, sir.

Q. Now, was there any feeling in that lump? A. I could feel the lump there, yes, sir; it was hard. First it was just like an egg under there.

Q. But the lump itself, could you touch it and feel it? A. Oh, bless you, yes.

Q. It was painful, of course? A. Why, not so very no. There was times that, as I say, it would kind of itch; be a little streak of pain from it.

Q. Now, the result of this medicine was that this lump just came off, did it? A. The lump kind o' settled—I put on medicine first to kind o' settle that lump down and soften it. It was pretty hard. There was a hole in it, and the other doctors had been treating it, and there was kind of a hole in it.

Q. Just confine yourself to what Dr. Johnson did. A. Well, I think the medicine he first put on it—he used several different kinds, but the first he put on kind o' softened that lump and it began softening down, and then he put in others that begun to take effect on it. I think it was about a week before he commenced with the other medicine that finally took it out.

Q. Well, these other medicines, when he began to put those on, did you feel a smarting sensation of pain? A. No, sir; it did not smart.

Q. Did you at any time feel a burning, smarting sensation? A. No, sir; not while he treated it.

Q. Not while he was treating you at all? A. No, sir.

Q. But at any rate in the end this thing came out—in big chunks? A. Yes.

Q. Now, did you correspond with Dr. Johnson before you came down? A. No, sir.

Q. Did you correspond with Dr. Bye? A. No, sir.

Q. Was he with Dr. Bye at the time? A. No, sir; not to the best of my recollection.

Q. Oh, this was last fall? A. Yes, sir.

Q. He was on Grand Avenue then when you came down here? A. Yes, sir; I very incidentally heard of him.

Q. Did you talk to Dr. Johnson the first one that you talked to when you came into his place? A. Yes, sir; I talked to a lady, I think, first. There was a lady came to ask me a few questions there, and she told me I could see the doctor pretty soon, and I went in to see him.

By Mr. Harkless:

Q. Mr. Sheley, I forgot to ask you what sized hole did it leave there when this cancer sloughed out? A. Left a pretty good sized hole.

Q. Tell the court how large it was—how deep? A. I think it was from half to three-fourths of an inch deep.

Q. And about how wide? A. From two to two

and a half or three inches wide; I didn't measure it, but to the best of my recollection.

(Witness excused.)

DR. CHARLES OTT, called as a witness on behalf of the defendant, having been duly sworn, testified as follows:

Direct Examination by Mr. Harkless.

Q. What is your name? A. Charles Ott.

Q. Are you at the head of any institution here in the city? A. I am president of the board of directors of Hahnemann Medical College.

Q. In this city? A. Yes, sir.

Q. Tenth and Troost? A. Tenth near Troost.

Q. How long have you been president of the college? A. Ever since it existed.

Q. How long has it existed, Doctor? A. I don't know—there have been quite a number of changes. I have been connected with the school in one way or another since 1896.

Q. How long have you been practicing medicine, Doctor? A. Well, about fifteen years.

Q. You are a regularly licensed physician, I believe? A. Yes, sir.

Q. Now, Doctor, I will get you to state if in your profession you pursue any special line of practice? A. I treat skin diseases considerably.

Q. In that business do you treat cancer? A. Yes, sir.

Q. I will get you to state, Doctor, whether or not a physician who makes a special line of study in treat-

ing a special class of disease or ailments, as a rule, is better qualified than the general physician who treats everything?

Mr. Morrison: I object to that as calling for a matter not the subject of expert knowledge, and as leading and suggestive.

The Court: He may answer.

Plaintiff excepted.

A. I think so.

Q. What is that founded on? What is the reason for that?

Mr. Morrison: I object to that.

The Court: I think that is a matter anybody would have a right to form an opinion about. A man who mades a specialty of a thing ought to know more about it than a man who don't pay much attention to it.

Q. Well, now, Doctor, in the treatment of diseases of cancer, you have spoken about—in the first place, tell us what are the different forms of cancer.

Mr. Morrison: That's objected to as calling for the conclusion of the witness, as to his interpretation of the word "forms."

The Court: I will let him give his opinion about it.

Plaintiff excepted.

Q. How many different kinds or variations of cancer are there? A. Well, that is hard to tell. It depends entirely on from what standpoint I subdivide it.

Q. Well, you—I want you to tell it. A. If you divide from the standpoint of pathology or histology. We usually speak of sarcoma and carcinoma, and include in that also the epithelioma.

Q. Now, those are the two general definitions, are they? A. Yes, sir.

Q. The two general forms? Now, those again are divided into different forms of cancer, aren't they? A. Yes, sir; there are varieties according to locations and according to the tissues involved.

Q. Well, now, what are the names of some of those? A. Well, we speak of osteo-sarcoma if it is found in the bone, and we speak sometimes of sarco-chondroma if it is in the cartileges. We speak of various others froms as encephaloid if it contains very little tissue except cancer cells. We speak of melano-sarcoma or melanotic, if the tissues have this black appearance—and so on indefinitely, according to the various writers.

Q. Now, Doctor, you have, I suppose, not only practiced and had experience with these diseases, but I suppose you have read something on the subject likewise? A. Yes, sir; I have.

Noon recess.

Direct Examination of Dr. Ott Continued by Mr. Harkless.

Q. You have been treating cancers, you say, for some years? A. Yes, sir.

Q. Wel, how have you been getting along about curing them?

Mr. Morrison: That is objected to as incompetent, irrelevant and immaterial what success this doctor has had.

The Court: Well, I will relieve the doctor's embarrassment and not require him to answer that question.

Defendant excepted.

Q. Well, have you been curing cancer?

Mr. Morrison: I object to that as incompetent, irrelevant and immaterial, and being no criterion to go upon.

The court: He may answer.

A. If the patient's being free from trouble from three to eight years is a cure I have cured some.

Q. How long? A. Eight years.

Q. How many have you cured in your practise, Doctor? A. I have not kept any track of them.

Mr. Morrison: I object to that as incompetent, irrelevant and immaterial.

The Court: He says he has not kept any track of it.

Q. Well, about how many?

Objected to by plaintiff for the reasons heretofore stated.

Objection overruled; plaintiff excepted.

A. Oh, somewhere from twenty-five to fifty.

Q. Well, you, a while ago, undertook to give us the different forms or varieties or breeds of these cancers, didn't you? A. I gave you some of them.

Q. Well, I say, some of them. I don't expect you to give them all; but you have given some of them. Now, have those various breeds of cancer been cured by you and are they curable?

Mr. Morrison: I object to that as leading and suggestive and not proper, hypothetical or expert questions, and not having any bearing upon this case.

The Court: I will let him answer whether he has cured them, but as to the other I will sustain the question.

Q. Doctor, have you cured these cancers, various types of cancer that you have mentioned, in your practice, and are they curable?

Objected to by plaintiff as incompetent, irrelevant and immaterial.

The Court: I think you had better ask him one of those questions at a time. Ask him if he has cured them.

Mr. Harkless: I did ask him that a while ago.

Q. Have you cured the kinds of cancer you have mentioned here? A. Not all of them.

Q. Well, how many different kinds have you cured? Give the names of them. A. Well, I am certain that some cases of epithelioma and carcinoma have stood the test for years. I have had one case of sarcoma that has stood the test for years; but whether I have encephaloid or not, I don't remember.

Q. Well, I have kind o' forgotten what that thing is. A. Oh, that is soft, brain like cancer, which consists of hardly anything else but cancer cells.

Q. That is a rare kind of cancer, is it? A. It is rather rare.

Q. Very seldom found? A. Yes, sir.

Q. Doctor, is the question of the curability of different kinds of cancer as dependent upon location and positions a somewhat mooted question among the profession?

Mr. Morrison: I object to that as not a proper expert question here.

Objection sustained; defendant excepted.

Q. What have you to say about that question, as to whether it is or is not a mooted question?

Mr. Morrison: I object to that as immaterial and not being a proper subject of expert testimony, and a question calling purely for opinion evidence.

The Court: I would like to hear his answer to that.

Plaintiff excepted.

A. I think it is.

Q. There is a certain line of physicians that have been contending that it is not curable, isn't there?

Mr Morrison: That's objected to as leading.

Objection sustained; defendant excepted.

Q. Well, is there a certain line?

Mr. Morrison: I make the same objection.

Q. Well, is there or not? A. Well, there is.

The Court: Well, he has answered it.

Q. And what particular line of physicians is it that still insist that cancer is not curable, if there is such? What class?

Mr. Morrison: I object to that as immaterial and irrelevant, as to what physicians insist that it is not curable.

The Court: He may answer.

Plaintiff excepted.

A. I really don't know who they are, but there are some.

By the Court:

Q. There are some physicians who insist that no cancer is curable?

By Mr. Harkless:

Q. Yes, some go so far as to say nothing is curable, and then others who claim that it is simply a question of the definition of what "cure" means.

Mr. Morrison: I object to that as incompetent, irrelevant and immaterial.

Mr. Harkless: I understand that some claim that even if a man gets well he is not cured, but relieved, and there is a different understanding of that word "cure." It strikes me that may be a reasonable means of accounting for some of their opinions, and I want to ask him if that is not true, and as to what they mean by "cured."

Mr. Morrison: I want to object to his asking these argumentative questions of the witness in a leading way. If the witness has these opinions they can be brought out properly.

Mr. Harkless: That is just what I am asking, as to whether he knows of two classes of physicians, one of whom claim that it is not curable, and a class that say that it is curable—if, as a matter of fact, he knows from his experience with them and talking with the various experts on this subject as to whether there is a difference of construction as to what the word "cure" means.

The Court: Well, the attorneys representing the Board of Health here have admitted that some cancers can be cured. I don't see any occasion for us, then, to go off into this mooted question as to matters not before the court.

Mr. Harkless: Of course, I would not ask it if I thought it was not proper to be done. I am trying to get before the court——

The Court: I don't want anything more before me than I have got on that. It has been admitted here that some cancers are cured, and I don't care what other doctors think about matters not in issue here.

Mr. Harkless: I thought that too, but Your Honor would not exclude that testimony that ought to be excluded. I have asked Your Honor to exclude all that sort of testimony.

The Court: I don't know what testimony you are talking about.

Mr. Harkless: Why, that so-called record here. It is full of that sort of stuff and I have been asking that it be excluded.

The Court: I have not read that record yet. I am going to, but I have not had time yet.

Mr. Harkless: Well, that is what they are saying all through there, and swearing to it all through there.

The Court: Of course, if there is any testimony of that sort in there I will exclude it. I don't care to consider matters not in issue under tthe pleadings in the case and the admissions.

Mr. Harkless: Well, if I could show Your Honor that when they say all cancers are not curable, the fact simply is that they do not mean they cannot be relieved, but what they mean is that even though the parties may get over it it is still in their blood the balance of their lives——

The Court: I think I understand the issue that is before me. This physician has advertised, so it is claimed by the Board of Health, that he has a remedy or specific for all cancers, or that all can be cured.

Mr. Harkless: That is the issue.

The Court: They admit some cancers can be cured, and claim that all cancers cannot be cured. Now, what is the use of going off into theories of doctors that say no cancer can be cured.

Mr. Harkless: I must insist we do not understand what this pamphlet is. If we are to be tried on this pamphlet I want to introduce the evidence about it. I have not been able to tell yet what these gentlemen claim the issue is.

The Court: Well, I am sorry.

Mr. Harkless: Your Honor may have an idea but I don't think yet that they have stated it.

The Court: I am not worried about the issues. I don't think it is an issue here whether no cancer can be cured. The issue is whether all can be cured.

Mr. Harkless: If we are getting around to the issue—if the issue is as to whether all can be cured, there is no statement in the pamphlet that they can all be cured.

The Court: They say there are some that cannot be cured, and you want to prove that some doctors say none can be cured. I don't care about those doctors because it is admitted here that some are cured. So what is the use of proving that. I will sustain the objection to this question. Let's go on.

Defendant excepted.

Q. I will ask you the question as to whether or not there is a difference of opinion among expert physicians, in speaking of the cure of cancer, as to what "cure" means.

Mr. Morrison: I object to that for the same reasons.

The Court: Oh, I don't care anything about that. I know what "cure" means. Any ordinary sensible man knows what it means to be cured. I don't care what the doctors think about it. Doctors disagree about what constitutes a cure. I don't care what they think or say. I am not going to have my mind influenced by that sort of testimony. The ordinary man knows what it means to be cured. This is a pamphlet addressed to the ordinary man, and I don't care what construction the doctors put upon that word or what they give to it. I am not going to split any hairs about the meaning of ordinary, every day words in this case.

Mr. Harkless: Well, that is the way I understand. They have some technical definition for it, I understand.

Q. Now, Doctor, where do you treat patients; here in the city? A. Yes, sir; I treat them here in the city over at our clinic and treat them at my office.

Q. Both? A. And in the hospital sometimes.

Q. Doctor, I will ask you whether or not it is not true that a majority of the cases of cancer can be determined to be cancer by observation without resorting to a microscope? A. I think so.

Cross Examination by Mr. Morrison.

Q. In order to definitely ascertain, however, in a great many cases whether the affliction is or is not cancer, you do have to resort to the use of the microscope, don't you, Doctor? A. There are certain cases in the diagnosis—the absolute diagnosis would be doubtful. But the great majority of the cases can be quickly diagnosed.

Q. Cancer is a form of tumor, is it not? A. Not necessarily.

Q. Don't you classify tumors as benign and malignant? A. Yes, sir.

Q. And is cancer a malignant tumor? A. Yes, sir.

Q. And when you speak of these varieties of cancer, such as epithelioma and carcinoma, that you say that you have treated—is there a distinction between epithelioma and carcinoma? A. In one sense, yes, and in another sense, not. Carcinoma and epithelioma have essentially the same cell arrangement; but the one usually originates in the epithelial tissue, and the other may originate in other kinds of tissue.

Q. Now, the encephaloid, which you speak of, that is a form of cancer and refers to the hardness or the softness, doesn't it? That has reference to the cell formation? A. It refers chiefly to this fact, that the stroma or connective tissue in this growth is so rare as to hardly give it any consistency.

Q. The stroma is what makes the cancer hard, isn't it? A. It is that which gives it more of a consistency, yes.

Q. Now, when you speak of scirrhus—is scirrhus a form of cancer? A. I never use that term much, but it usually means a cancer which is more hard than the ordinary form.

Q. So that term simply means that it is hard? A. More hard.

Q. That is as generally used? A. Yes, sir.

Q. So that when you say that a cancer is scirrhus that does not distinguish as between the various—well, what I call the cellular formations—that is to say, you have what you call pavement cells of cancer and cylindric cells and scirrhus? A. If my understanding is right, the hardness is brought about by the amount of connective tissue in there, yes, whilst the form of cells growing there will not make so much difference.

Q. That is the point I am getting at; the form of the cell does not make so much difference, but it is simply a hard growth? A. As the term is generally used, that is correct.

Q. It is what you call a clinical term rather than pathological? A. It is more clinical than pathological. The cell does not take any special form of cancer.

Q. And when you speak of pathological, what do you mean? A. Pathological means abnormal; something that is not occurring in a healthy condition.

By the Court:

Q. Doctor, you spoke of carcinoma and sarcoma, in respect to your testimony, as different types or forms? A. Yes, and different forms of that.

Q. What is the difference between sarcoma and

carcinoma? A. In carcoma, if you view it under the microscope, you will find that the cells are more scattered. For instance, the center where it is practically nothing but cells, and further out less. But if you have carcinoma you would find the cells in nests—in alveoli—here a bunch and there a bunch, and there a bunch of them. That is the arrangement of the cells. The cells may be of various forms.

Q. Now, that is—— A. (interrupting) Well, the carcinoma is the alveolated form, where it comes in bunches or nests. Sarcoma is more generally distributed.

Q. Which is the most malignant form? A. Sarcoma.

Q. Of course sarcoma is very rare? A. Comparatively more rare because of the more general distribution. The distribution of sarcoma comes on much more quickly than carcinoma, because the carcinoma in spreading has a tendency to take in the contiguous thick tissue; while the sarcoma being in closer relation to the lymphatic channels and blood vessels is more apt to be carried on to much greater distance.

Q. Is there any difference in the locality where they are likely to be found? A. No.

Q. Is carcinoma more likely to be depleted? A. No, you can find them in any part of the body—either form; for instance, in the mammary gland—the breast—you will find sometimes sarcoma and sometimes carcinoma.

Q. How about the stomach? A. In the stomach you will sometimes find sarcoma, but more often car-

cinoma, or rather epithelioma, which is by some classed as a form of carcinoma.

By Mr. Morrison:

Q. Doctor, in sarcoma you have connective tissue cells, as a rule, and in carcinoma the epithelial cells? A. Oh, no.

Q. You don't make that distinction? A. I don't think so.

Q. Now, in the distinction you have just drawn between carcinoma and sarcoma, could you arrive at that distinction by clinical diagnosis without microscopical examination? A. We would have to take into consideration various things; for instance, the history of the case, the general form, the rapidity of the development, and all such things.

Q. And in the end your diagnosis would be very inaccurate unless you had a slide made and examined under a microscope, wouldn't it, Doctor, so that if you just get a description by mail it would be very nearly an impossibility in a great many cases to distinguish, wouldn't it? A. Well, it would often be difficult. It would be entirely impossible, unless you had such a history as practically to preclude the one—sarcoma being of much more rapid growth. For instance, if the tumor assumes the black form, the melanotic, it could not be anything but the melanotic sarcoma; it could not be carcinoma.

Q. In other words, you think there might be some feature that would distinguish them? A. There might be some feature that would enable me to tell whether I had to do with carcinoma or sarcoma.

Q. And then again there might not? A. Yes, sir.

By the Court:

Q. Is there any difference in the treatment? A. No, sir; no difference in the treatment.

By Mr. Morrison:

Q. Now, if you had this hard formation in regard to which I used the word scirrhus awhile ago, as you stated that might be any one of these cell formations? A. Carcinoma admits of various forms of cells, cylindrical and the large round cells, and the small round cells, and I have seen most cylindrical cells and round cells in the same specimen.

Q. In the scirrhus form of cancer? A. I don't know whether that was the scirrhus form or not; I don't remember that; but I have seen specimens of cancer in which the same specimen had both kinds of cells.

Q. So you might have this pavement cell form in a particular cancer, or you might have in the same formation a cylindrical cell, and you could not tell, unless you examined it under the microscope? A. I don't understand what you mean by "pavement cells." You mean these large flat cells—epithelial cells?

Q. Well, large, flat epithelial cells—take those, for example. A. Well, they would occur only where there was epithelial tissue—often spoken of as squamous cells.

Q. Well, would that be where you would find this epithelial tissue? Don't you find that almost everywhere in the body? A. Well, every mucous membrane has it, and every part of the skin has it, and any cancer that

involves a mucous membrane or a cancer that involves the skin would be likely to have some of those cells.

Q. Then you are liable to find this form of cancer in any part of the body because that tissue, you say, is liable to be found in any part of the body? A. I don't understand that that cell is distinctive of any form of cancer.

Q. Well, these various cell formations, as I term them—that is probably not a technical way of expressing it—but these various cell formations are liable to occur in the hard or soft form of cancer—that is, the scirrhus and this what we call the encephaloid—is that the term you use? A. The distinction between these forms is not in the cell formation as much as in the cell arrangement.

Q. So that it is not a pathological sub-division—this division between scirrhus and encephaloid, for example? A. I don't know whether I grasp your meaning.

Q. Well, I mean there is not a line between what I would call the scirrhus type and the encephaloid type—there isn't any line of division with regard to the cell formation? It is the line of division only as to hard or soft? A. I am not sure that I am able to answer that question. Of course, I have not investigated that point.

Q. Now, Doctor, it is a fact, isn't it, that in your experience you find severe cases where the tumor itself is sometimes removed or caused to disappear and heal up, and that there is a recurrence of the sore in years afterwards? A. Yes, sir; that can occur easily.

Q. Sometimes a great many years afterwards, or a number of years, at least? A. There is—I don't know whether I can—I think I can answer it that way.

Q. So it is very difficult in a given case to arrive at a line of demarcation where you can be reasonably sure that there will be no recurrence of a cancer? A. There are certain rules, and it is usually accepted that if a case has stood from three to five years a recurrence becomes extremely improbable.

Q. Doctor, a case in which the cancer disappeared, and which healed up last October, then, would present no data from which you, as a physician, could arrive at a definite conclusion as to whether it had been cured or not, if it was a true cancer, would it? A. There is this: If you find an epithelioma where the malignant tissue has been all removed, it will heal up kindly and nicely. If there is any of it left it will not heal up. However, if, before you attempt to treat the case, some of these cells had been carried off to some distance, these cells may form a new growth sometime after. That I have seen.

Q. Now, isn't it also true that in carcinoma you may have a colony or group of cells which are detached from the main sore; in other words, a patch—— A. (interrupting) That is just what I meant—carried off somewhere else.

By the Court:

Q. Do these cells ever get into the blood? A. That is a question—whether they are carried off by the blood stream or by the lymphatic vessels; but they are

sometimes carried off to distant parts of the body, especially in sarcoma, and we have then what is known as metastatic cancer, and we may have a cancer of the lip, and then have cancer in some other part of the body.

Q. That is, getting a little giant in the blood? Is that what they call a little giant in the blood? A. There is a certain form of cancer belonging to the sarcoma class in which there are some extra large cells, known as giant sarcoma, and these forms are more malignant than the usual carcinoma, because of the tendency to send it out.

Q. That is, sometimes they get into the blood, isn't it? A. That is what people say, that it gets into the blood. But it is a question—experiments have shown that in the case of cancer of the lower extremities that certain lymphatic channels are thereby lined with cells right along for a long distance, even up to the heart.

Q. That is about the most malignant form there is? A. Yes, sir; the most malignant forms are the encephaloid and the melanotic sarcoma. The melanotic sarcoma or black cancer is the one that travels most rapidly. I have seen one case, for instance, where it started above the neck that would be cut out by the doctor and then cauterized, and it broke out again, and then it was removed and all nicely healed up, and then a foot away another group sprung up, and another sprung up here (indicating), and another one there, until there were a dozen groups in various parts of the body.

By Mr. Morrison:

Q. Doctor, do you use the knife in the treatment of cancer? A. Sometimes; yes, sir.

Q. Is it true that fatal results always follow the use of the knife in the treatment of cancer? A. I am not sure about that. The author of the American Text Book of Surgery stated years ago that ten per cent of the cases operated on were cures.

By Mr. Harkless:

Q. Even by the knife? A. Even by the knife. I personally believe this—if it is wanted here—that there are some tumors that can best be removed by the knife and then followed up by other methods; get the growth out of the way and be able to work so much more quickly and better; but that is my personal opinion.

By Mr. Morrison:

Q. In these cures you say you have made, did you ever remove any cancerous growth by the knife? A. Yes, sir.

Q. So some of these what you classed as cured were cases in which you operated by the knife? A. A few of them, yes, but——

Q. (interrupting) Then your experience— A. (interrupting) Excuse, me. I would say, I follow those cases by other applications.

Q. But it has not been your experience, then, that the patient always died after you operated on the cancer with the knife? That has not been your experience? A. No, sir.

Q. That is all.

By Mr. Harkless:

Q. You don't use the knife alone, but only use the knife to get something out of the way, and then put on medicines afterwards to take out the cancer? A. Yes, sir.

Q. You don't depend on the knife, to remove everything with the knife, and make no applications, do you? A. No, I do not, because I have learned by experience. You never know in which direction cancer has already spread.

Q. And you may kill the party by using the knife when you don't know about that? A. Not necessarily that, but you might not get it all.

Q. Well, you don't consider the knife treatment, then, the best treatment?

Mr. Morrison: I object to that.

Mr. Harkless: Then why do you ask him about it?

A. I don't believe the knife method is the ideal method because of the fact that we never know in what direction the growth has extended. I have seen an epithelioma right below the eye which extended upwards only half an inch and downwards an inch and a half, and I don't know which way I would have cut if I had taken the knife.

Q. You can't tell? A. No.

Q. You have to just guess at it, and if you happen to hit it it's all right? A. Yes, sir; I have seen, however, cures made by the knife that were permanent.

By the Court:

Q. Doctor, is cancer of the stomach curable? A. I must say I have no experience in it. I have not been able to cure any yet.

Q. Do you know of anybody that ever did? A. I do not know of anybody that ever did.

By Mr. Harkless:

Q. Did what? A. Cure cancer of the stomach.

Q. Did you treat cancer of the stomach? A. Only in a palliative way.

Q. Well, can you know whether you cure it or not? If you treat it, and the fellow lives, then what do you think about it? A. I would be tempted to say that he did not have cancer.

Q. That would be the idea, that he didn't have it originally. Well, if you treated him, now, and he died, what would you say? A. I would feel like saying he had cancer.

Q. Now, do you treat cancer of the uterus? A. Yes, sir.

Q. Well, is that curable too, sometimes? A. Yes, sir.

Q. You have cured that, have you? A. I don't know; the case has not stood the test yet.

Q. You think you have? At least you have relieved it? A. I hope so.

Q. What do you understand it is to cure cancer anyhow, Doctor? A. In an incipient case my cure would be made by the knife, by removing the whole uterus.

Q. Taking it clear out? A. Yes, sir.

Q. Well, now, when you speak of curing cancer, is there any such things as a cure really of it? A. I don't know. I have heard of cases, and I have seen peo-

ple who claimed to have had it many, many years ago, who have never had any recurrence; but I don't know whether those were genuine cases or not, so I cannot tell.

Q. If they die they had it, and if they get well they may not have had it?

Mr. Morrison: I object to that as argumentative.

Q. Ain't that about the best guess you can make?

Mr. Morrison: I object to that as incompetent, irrelevant and immaterial, and cross examination of his his own witness.

The Court: Yes, this is your witness.

Q. I ask you, now, isn't that about the best guess the profession can make about it?

Mr. Morrison: I object to that as incompetent, irrelevant and immaterial.

Objection sustained; defendant excepted.

Q. What do you say generally, then, Doctor? What do you say about the question as to whether—suppose we take a hypothetical case—take a physician treating a woman for cancer of the uterus, and he treats the case; if it is cancer, now, and he treats the case and she dies, what, generally, is the opinion of the medical profession then, and would be the opinion, as to whether she has cancer or not?

Mr. Morrison: I object to that as leading and suggestive and argumentative and immaterial, and I don't think it throws any light on this controversy.

Q. Well, would you say, as an expert, that therefore she had cancer, if she died?

Mr. Morrison: I don't think that is a proper examination of Mr. Harkless' witness.

Mr. Harkless: I am not talking about him now, but about the people that have——

The Court: I will sustain the objection.

Defendant excepted.

Q. Is your method of treatment, Doctor, local and constitutional, largely? A. I depend chiefly on local remedies because I know or hold that cancer in the beginning is always a local disease; but constitutional remedies must be given to help along, because there is——

Q. (interrupting) To brace up the system? A. To brace up the system, and so on and so forth.

Q. Now, Doctor, what is the purpose of the constitutional treatment? A. As far as I am concerned, the purpose is simply to help eliminate and absorb matters and improve the assimilation of nutrition, and thereby build up the general condition of the system.

Q. And neutralize any poisonous condition? A. If we can, yes.

Q. Does this constitutional treatment aid digestion also?

Mr. Morrison: That is objected to.

Q. Well, what effect does it have on digestion—the constitutional treatment? A. Why, if any at all, it certainly favors digestion—aids digestion.

Q. And is it the purpose to eliminate this cancerous poison from the system also, as much as possible?

Mr. Morrison: I object to that as leading and suggestive.

Objection sustained; defendants excepted.

Q. Well, what is its purpose with reference to the subject of eliminating cancerous poisons from the system?

Mr. Morrison: I object to that as leading and suggestive and assuming that there is such a thing as cancerous poisons.

Q. Well, is there such a thing as poison from cancer, in that sense? A. That is a question not fully decided; but one thing seems to have been settled, that cancerous growths have a marked influence on the blood, so that a cancerous anaemia is found sometimes when there has not been any lack of foods, nor has there been any marked malnutrition otherwise.

Q. Well, Doctor, is it regarded, now, by you and people who are posted upon the origin of cancer, that cancer is brought about as the result of a diseased condition of the blood, or does the cancer produce the diseased cancerous condition of the blood? A. I think the preponderance of opinion goes to the fact that cancer produces the diseased condition.

Q. But the blood may then afterwards become diseased as the result of the course of the cancer, if it gets too far along? A. Yes, sir.

By the Court:

Q. Just a moment there. Now, when you get the diseased condition of the blood, will that condition of the blood cause cancer to appear in another part of the body? A. No, sir; I think not.

Q. It does not have that effect? A. It does not

have that effect; but the patient becomes pale, anaemic, breaks down and sinks.

Q. But the cancerous germ, or whatever it may be, does not get into the blood and cause its reappearance somewhere else? A. That was not my meaning at all.

By Mr. Harkless:

Q. However, there is a difference of opinion on that, as to whether it is carried through the blood or through the lymph? A. Yes, sir; there is a difference of opinion on that.

Q. Eminent physicians, or rather physicians that think they are eminent, disagree on that subject?

Mr. Morrison: I object to that.

Q. Don't they?

Mr. Morrison: I object to that.

Objection sustained; defendant excepted.

Q. Well, do they?

Mr. Morrison: I object to that for the same reason.

The Court: The objection is sustained.

Defendant excepted.

Q. You may state, if you please, whether or not, with reference to that subject, how different parties think upon it, whether they all think alike or think differently, and if so, in what way? A. In cancer, as in many other things, there are various opinions.

Q. I want to ask you another thing, Doctor. Do you know whether pneumonia is curable or not?

The Court: Are you cross examining your witness? All this is very interesting, but I don't know what it has to do with the case. He is your witness.

Mr. Harkless: I am not cross examining him. I want information.

The Court: I don't care what you want; we are trying a law suit, and I want to get through some time.

Mr. Harkless: My idea, Your Honor, was to show that pneumonia—that the patient may recover, and still he is not well; and the same proposition applies to cancer.

The Court: I presume you might ask as to the stomachache, too, but I don't think it would be material.

Defendant excepted.

Q. Now, I will ask you, Doctor, to state to the court whether, in your opinion, there is a known remedy for cancer in all its various forms?

Mr. Morrison: I object to that as calling for the conclusion of the witness, and as leading and suggestive.

The Court: I will hear his answer to that.

Plaintiff excepted.

Q. I will ask you, Doctor, to state to the court whether, in your opinion, there is a known remedy for cancer in all its various forms, or a combination of remedies? I do not mean necessarily one.

The Court: You may answer.

Plaintiff excepted.

A. I cannot answer that by yes or no, because it includes facts which we could not get at.

Q. Well, I am speaking of the classifications of cancer. A. Oh, if you mean a remedy that will cure sarcoma and carcinoma and epithelioma——

Q. (interrupting) Yes, or combinations of remedies. A. In the regions where you can reach them?

Q. Yes, sir; certainly. A. Yes, sir; there is a remedy. I have about twenty-five different formulae, not for sale, though, but to give away.

Q. Now, then, in your opinion, then, Doctor, as an expert, will you say that these various forms that have just been mentioned are curable by the known remedies?

Mr. Morrison: That's objected to, and I think the doctor has suggested the objection to that. That one word "forms," he says, includes cancer in places that you cannot get at.

The Court: I am going to determine what the word "form" means. That is another thing, I think, that has an every day meaning, and that I know just as much about that as the doctors. I am going to let them use their own words in their own way, and then I am going to come to my own conclusion about it. Now, I understand this doctor refers to the location when he says they cannot be cured.

Mr. Harkless: Well, I want to put the question in the opposite case of the questions that have been put to other physicians time and again in this testimony.

Q. I will ask you if there is any known remedy, known to the practitioner, for the cure of cancer in all its forms?

The Court: You have asked him that, and I let him answer.

A. I said yes, if I can get at it.

Re-Cross Examination by Mr. Morrison.

Q. That is, a form you can get at you can cure, and a form that you cannot get at, such as cancer of the stomach, you cannot cure? Is that what you say, Doctor? A. I would not try to cure a form I could not reach because you have to make a local application.

Q. So when you are asked the question—if I brought a patient to you and I should say, "Doctor, this man has a form of cancer, can you cure it?" would you say you could without knowing where it was? A. I would modify my answer, certainly.

Q. Now, of course, you can get at cancer of the stomach by cutting a man open——

Mr. Harkless: We are doing a good deal of chasing around as to location and form.

Q. You don't mean you could cure cancer of the stomach merely because it could be gotten at, regardless of position, or that you could cure cancer of the uterus, regardless of the time it had existed? A. No, sir; and nobody would ever say that.

Q. So there would be forms of cancer of the uterus you could not cure, and would know you could not cure when you first saw it? A. Certainly. My answer refers to the three leading types that have been under consideration—carcinoma, sarcoma and epithelioma; but not as to where you might find it.

Q. And not as to the stage they were in? A. No.

Q. And if you got a carcinoma of the uterus and it was in an advanced stage, what would you do—that came to you for treatment? A. I would save myself and tell them to go home.

Q. Why? A. Because I would be sure that it had been carried by the lymphatics to some place that I could not reach.

Q. And hence that you could not cure it? A. Yes, sir; but that would not say that there were not some forms that I could cure.

Q. But, at best the treatment in such a case as I have mentioned, would be palliative only, and you would not expect a cure? That is correct, isn't it—an advanced carcinoma of the uterus? A. I would not promise a cure.

Q. And even if you got a carcinoma of the uterus in its incipiency, and removed the entire uterus, would you promise a cure? A. Very nearly, yes, sir.

Q. But in that case you would have to get it when it was in its incipiency? A. Yes, sir.

Q. And then remove the entire uterus with the knife? A. Not necessarily.

Q. Did you remove this case, you have mentioned, with the knife? A. I forget which you refer to.

Q. Did you mention a case in which you had got hold of carcinoma of the uterus in its incipiency and removed the entire uterus with the knife? A. Yes, sir.

Q. And stated that you hoped you had a cure, I believe? Is that correct? A. I won't express anything more definite, because you never know whether or not some of those cells might have been carried by some lymphatic, and would appear again shortly after.

By Mr. Harkless:

Q. You won't, Doctor, however, undertake to say

that physicians have not cured cancer of the stomach? A. I don't know what others have done. I only say what I have done or not done.

Q. So, of the uterus, or rectum. Now, is the constitutional treatment calculated for or indulged in for the purpose of building up the blood stream and improving the general system and condition of the patient? A. Chiefly.

By Mr. Morrison:

Q. Is there any remedy to be taken internally, that you know of, that destroys the cancer cell? A. I have never found one yet that has done it in my cases.

By Mr. Harkless:

Q. But you could not swear there is none? A. No.

By the Court:

Q. It must be local treatment for cancer—is that right? A. Yes, sir; so far as we know—as I know.

By Mr. Harkless:

Q. As well as constitutional? A. Yes.

By Mr. Morrison:

Q. The constitutional treatment is for the building up of the system generally—is that right? And you do not give it for any direct action on the cancerous cells? A. I will say this, that there are some that claim—I have seen reports from other doctors that claimed that they have been able to do it, but in my own experience I have not seen these results.

Q. And the constitutional treatment that you spoke of that you give, is to build up the general health of the

patient, and not to act directly on the cancerous cells? Is that right? A. Yes, sir.

By Mr. Harkless:

Q. What were you going to state about the claims of other physicians on the subject?

Mr. Morrison: I object to that as hearsay.

The Court: I will sustain the objection.

Defendant excepted.

Q. Well, do you know what is claimed among the medical profession as to the constitutional treatment—as to what effect it may have on the cells, by parties skilled in the business?

Mr. Morrison: I object to that as incompetent, irrelevant and immaterial, and not a proper hypothetical and expert question.

A. I have heard all kinds of claims. Some of us—

Mr. Morrison: Wait a moment. I am objecting.

The Court: I think it is proper to let him express his opinion based on his knowledge. Of course that may be competent from what he knows of the general learning on the question; but when it comes to stating what some other doctor says, that is not competent.

Defendant excepted.

Q. Well, so far as you know, the claim by some that the constitutional treatment does directly or indirectly have effect upon the cells, may be true?

Mr. Morrison: I object to that for all the reasons heretofore stated.

Objection sustained; defendant excepted.

(Witness excused).

MRS. ELLA HARPER, called as a witness on behalf of the defendant, having been duly sworn, testified as follows:

Direct Examination by Mr. Harkless.

Q. Where do you reside? A. At 506 Wabash.

Q. Here in the city? A. Yes, sir.

Q. How long have you lived here? A. About eighteen years.

Q. What business is your husband in? A. My husband works for Glazner & Barzen.

Q. I will ask you to state, Mrs. Harper, if you at one time suffered from what was regarded as cancer of the uterus? A. I did.

Q. In the first place let me ask you, did you have a sister? A. I did.

Q. Did she at one time suffer from the same thing, do you know? A. She died with it.

Mr. Morrison: Wait a moment. I object to that. This is not an expert——

The Court: Well, I will let that stand.

Mr. Harkless: Well, I will have a physician here who treated this woman, and I will have him here to prove what it was.

Plaintiff excepted.

Q. Now, you say you had a sister that died. About how long before you became affected? A. Well, I think it was about a year.

Q. Who treated her? A. The first doctor was George Marshall, and then Dr. Riegle—D. H. Riegle.

Q. Then did Dr. Riegle also treat you? A. He did.

Q. Now, what was your trouble? A. With the uterus.

Q. What did you first discover about it? When did you first discover it? A. Well, my general health gave down, and I was very weak and nervous, and had loss of appetite, and just a general give down and some pain; and I naturally—my sister having died with it, I was fearful of that, and my husband had me go to Dr. Riegle and had him make an examination.

Q. Did Dr. Riegle make an examination? A. He did.

Q. Where was it—at his office or in your house? A. At his office in the Altman building.

Q. Where is his office? A. Well, it was in the Altman building. It is now on Summit Street.

Q. Was he your regular family physician? A. He was.

Q. Now, Madam, I want to ask you did he then tell you what was the matter with you? A. He says, "You have"——

Q. (interrupting) Wait, now. I don't want you to tell what he said. They won't let you do that, although I am insisting that you should—but the court has ruled that you shall not. In the first place I will ask you to state what he did say, upon the examination, was the matter?

Mr. Morrison. I object to that.

Q. (continuing) whether upon the examination after he had made it, in order to advise you what your difficulty was and what you should do, in stating to you what your trouble was?

Mr. Morrison: I object to that as calling for hearsay testimony.

Q. As a part of that examination? A. He did.

Q. Now, don't answer this question until the court tells you you can; but I will ask you to state what he said to you was the difficulty, in that examination, and while he was making it.

Mr. Morrison: I object to that as hearsay.

The Court: Whom are you talking about now—Dr. Riegle?

Mr. Harkless: Dr. Riegle.

The Court: I will sustain the objection. I think it is not only hearsay, but I don't think that is the question, what somebody said it was, but the question is what it was; and the admission, of course, of an outside party, a stranger to this suit, would not be admissible.

Defendant excepted.

Q. Now, after he told you about it what did you next do—or first, did he say whether he could cure it for you or not?

Mr. Morrison: That is objected to as immaterial.

Q. Not saying what it was now, but did he give you any advice about the curability of it, or what you should do with it?

Mr. Morrison: I object to that as incompetent, irrelevant and immaterial.

The Court: The objection will be sustained.

Mr. Harkless. I am not asking what he said it was, but if he gave her any advice.

A. Yes, he gave me——

Mr. Morrison: Wait a moment. I move to strike out that answer.

The Court: I will sustain the motion.

Defendant excepted.

Q. Did you then go to somebody else to be treated afterwards? A. I did.

Q. Whom did you go to? A. Dr. Johnson.

By the Court:

Q. Who? A. Dr. O. A. Johnson.

By Mr. Harkless:

Q. After he had told you what the difficulty was, did you go home? A. I did.

Q. What occurred then after that? A. I had two or three nervous chills and was prostrated for several days—every day.

Q. Well, did you then go finally to Dr. Johnson? A. I think it was about three weeks before I could get up my courage to go anywhere else.

Q. What was your general condition, Madam, then? How had it reduced you? A. I weighed about ninety-six pounds. My health was very bad in every way, and no appetite.

Q. Were you weakened? A. Weakened; I could hardly walk.

Q. Well, did you finally go to Dr. Johnson? A. I did.

Q. Now, when you went to him did he examine this matter for you? A. He did.

Q. Did he inquire about the history of the case and your family history? A. He did.

Q. Well, did you tell him about your sister's troubles? A. I did.

Q. And you told him who treated you? A. Yes, sir.

Q. And who had pronounced on it? A. Yes, sir.

Q. And what they had said? A. Yes.

Q. And then after he had made the examination what did he tell you it was? A. He told me it was cancer.

Q. Did he commence the treatment then? A. He did.

Q. Now, about how long did he continue to treat it? A. About five months, I think it was.

Q. Now, what was the manner of this treatment? A. Well, he gave me a tonic to build me up, and also an application. I went to his office twice a week, and he applied something to the cancer.

Q. Applied this stuff on the place in the uterus, did he? A. Yes, sir.

Q. Now, did it pain any? A. Sometimes it did, yes, sir.

Q. And other times it would not? A. And other times it would not.

Q. Now, did he continue to put this medicine, whatever it was, on the part inside or in the uterus? A. Yes, sir.

Q. Now, you say he continued that about four months? A. Yes, sir.

Q. Now, what finally happened, to your personal knowledge, in reference to a result? That is, what did you begin to find, now? A. Well, for about four weeks

I did not find any difference in my condition. I was still very weak and very much discouraged; and I told the doctor that I thought no one could do me any good. I had seen my sister die such a terrible death, and I had very great fears of anything of the kind; and he told me, "why, this is a disease that takes time to cure, and you must have patience and not get discouraged." And I did, and in about four weeks I began to improve. My general health—my appetite got better. I wasn't so weak and run down; and my energy seemed to begin to return to me, and my general health began to improve right along, and when I left Dr. Johnson I weighed a hundred and twenty pounds.

Q. Now, Madam, did you discover, while this treatment was going on, any pieces of anything passing away from this place? A. I did.

Q. Just describe that to the court, and how that happened, and about what time those things commenced to appear? A. Well, I don't just remember, but I think it was about four or five weeks, maybe, before I ever noticed anything of the kind, and it was a kind of sloughing off, passing away of the tissues.

Q. And you could observe and see? A. Oh, yes, sir; yes.

Q. Now then, did it gradually continue to slough away and pass off? A. Yes, sir.

Q. And finally—A. (interrupting) All ceased.

Q. (continuing) all ceased? A. Yes, sir.

Q. And what was the result afterwards—after you got through with it? How have you been since? A.

I have been in perfect health; better than I had been for ten years before.

Q. Now, was the pain and soreness gone? A. Entirely.

Q. Now, Madam, I wanted to ask you—you have had children during your life, have you? A. Yes, sir.

Q. At any time previous to this did you have a laceration? A. I did—at the birth of my last child.

Q. Was it sewed up? A. No, sir.

Q. It was not sewed up? A. No, sir.

Q. Did Dr. Johnson treat you with a knife? A. No, sir.

Cross Examination by Mr. Bland.

Q. How did Dr. Johnson examine you when you went to see him? A. Like all such examinations are made.

Q. Did he examine you with his naked eye? A. Why, with an instrument, of course, and with the naked eye I suppose.

Q. He used an instrument? A. Some kind of an instrument, I suppose, that all doctors use to make such examinations.

Q. And he took out a portion of this and looked at it? A. Oh, no.

Q. He didn't take out any—just examined the sore right where it was? A. Yes, sir—right where it was.

Q. By the use of the naked eye? A. Well, yes; with his naked eye, I suppose and with this instrument that the doctors use.

Q. By the instrument used, you mean for dilation? A. Yes, sir.

Q. It was not a glass? A. No, no; I think not.

Q. Now, you say you had had this trouble with the uterus previous to that time? A. Why, the laceration I had, yes, sir.

Q. You had had a laceration in child birth? A. Yes, sir.

Q. What other trouble had you then? A. None.

Q. No other trouble? A. No, sir.

Q. How often did Dr. Johnson treat you? A. Twice a week.

Q. Did he dilate the womb each time? A. Yes, sir.

Q. Was the treatment painful or otherwise? A. Sometimes it was very. That is, there was a burning and hurting.

Q. What as to the dilation of the womb? A. No.

Q. It was not painful? A. Well, I don't think my trouble was inside of the womb.

Q. Oh, it was not? A. No, sir; it was on the outside.

Q. Then you did not have an affection of the uterus—it was the vagina? A. No, it was the uterus; but I never asked Dr. Johnson, but I imagine it was just on the outside.

Q. And he never dilated the womb at all? A. Well, you will have to ask Dr. Johnson about that. I never asked him; I don't know. If he did I don't know.

Q. He did not make an opening into the womb? A. It was on the outside—just outside, I think.

Q. What part of the outside was it? A. Well, I couldn't tell you.

Q. How near the surface was it? A. Well, I suppose it was near the surface; I suppose, on the outside.

Q. How near the outside? A. I don't know; I never asked.

Q. You don't know how deep it was? A. No.

Q. Did it bleed? A. Some; it did; the sloughing off, there would be blood with it.

Q. Did it bleed after he treated it? A. No, only the sloughing off, as I say; then there was blood passed.

Q. It did not bleed before that time? A. No.

Q. When he first began to treat it? A. Oh, well, it may, just a little; but very little.

Q. You did not know the nature of the instruments he used? A. No, I do not. It was not an instrument; it was just something to make an examination. I suppose you would call it an instrument, too; it was just something to make an examination; that doctors use.

Q. You don't know whether it was pointed or sharp? A. No, it was not sharp. No, there was nothing sharp about it.

Q. How many children have you had? A. I have had seven.

By Mr. Harkless:

Q. Do you remember, Madam, whether this instrument was what is called a speculum? A. I think so.

Q. The same kind of an instrument as the others had used? A. Yes, sir; the same kind that Dr. Riegle used. Yes, that was it; I couldn't think of it.

(Witness excused).

WILLIAM C. LYON, called as a witness on behalf of the defendant, having been duly sworn, testified as follows:

Direct Examination by Mr. Harkless.

Q. What is your name? A. William C. Lyon.

Q. Where do you live? A. Waverly, Kansas.

Q. How old are you? A. Seventy-four past.

Q. What is your business? A. I am a retired farmer.

Q. Were you at one time suffering with some affection in the nature of a cancer? A. Yes, sir.

Q. Where was it? A. On my nose.

Q. Right or left side? A. Left side of the right lobe of the nose.

Q. How long had you been suffering with it? A. About five years.

Q. Describe the nature of it and how it acted? A. I don't know how it come at all. It started as a sore and kept getting larger.

Q. Did it feel very bad? A. Not much feeling in it at all; neither itched nor smarted; not much feeling about it.

Q. How large did it get to be? A. Got to be about as large as the end of my small finger.

Q. Gradually kept getting larger? A. Not very fast.

Q. But it did get larger? A. Yes, sir; a little larger; but not very fast.

Q. Now, did you go down to have it treated? A I spoke to the doctor in the town where I lived, and they did not decide what it was, for awhile; but finally they said it was cancer.

Mr. Bland: I move to strike out that answer.

The Court. What the doctors said may be stricken out.

Q. Now, did you come down here to have it treated? A. No, sir.

Q. How was it treated? A. It was treated by the doctor treating me at home. He sent me a blank and I filled out everything and told him what it was, and described it, and marked it on his drawing on the blank.

Q. Gave him a full description of it? A. Yes, sir; as near as I could.

Q. Did you have a doctor at home to help you fill it up? A. No, sir.

Q. You filled it up yourself? A. Yes, sir.

Q. Was it a blank of this character (showing witness a paper)? A. Partly, but there was—that is the thing (referring to another paper). That is it exactly. I marked right on here (indicating).

Q. A question blank? A. Yes, sir; and I marked right there where it was (indicating).

Q. Now, then, in obedience to that did he send you medicines to treat you with? A. Yes, sir.

Q. And to apply? A. Yes, sir.

Q. Who treated you? A. Dr. O. A. Johnson.

Q. How long did he treat you? A. About three weeks.

Q. And what finally happened? A. It kept growing smaller and smaller, and finally dropped—kind of sloughed off, by using his medicines. He sent me a salve for it, and it left the pure, clean flesh under there, and finally it came out and it was as big as that (indicating); I could put the point of my finger in the hole after it came out.

Q. How long ago has that been? A. Two years ago.

Q. And how have you been since? A. All right; as well as I ever was.

Cross Examination by Mr. Morrison.

Q. Did you ever see this book, showing witness the pamphlet issued by Dr. Johnson (the defendant)? A. I don't think I ever did. The one I saw that the doctor sent me had portraits of different persons in that had been cured. I don't remember of seeing that.

Q. You got a book of some kind from Dr. Johnson? A. Yes, sir; I did.

Q. And you wrote him about your case and got one of these prescription blanks? A. Yes, sir.

Q. I mean symptom blanks? A. Yes, sir.

Q. Such as this which has been marked Exhibit C with this transcript? A. I suppose so, yes.

By the Court:

Q. How did you first see Dr. Johnson? A. By other parties that was cured right where I lived in

Waverly. Mr. Rathbone was one, and Mr. Donelly, the postmaster, was another.

By Mr. Morrison:

Q. Did you ever read Dr. Johnson's advertisements? A. No, sir; I never read them at all.

By Mr. Harkless:

Q. What did you say about the postmaster? A. I said the postmaster, Mr. Donnell, was one of the men —he had got cured on the lip, and Mr. Rathbone was another.

Q. And that is the way you came to go to him? A. Yes, sir.

Q. Where is Mr. Rathbone now? A. He sits right back there by that post.

(Witness excused).

MRS. HATTIE J. WOOD, called as a witness on behalf of the defendant, having been duly sworn, testified as follows:

Direct Examination by Mr. Harkless.

Q. Where do you live, Mrs. Wood? A. In Perry, Iowa.

Q. How old are you? A. I am fifty-two.

Q. Were you affected with some cancer trouble? A. I was.

Mr. Morrison: I object to that. It is well understood that this is lay testimony as to whether this is a cancer or not.

The Court: I will let them call it what they please.

Mr. Morrison: Of course we have objected to that and made our record, and we don't want to be objecting.

The Court: The objection is overruled.

Plaintiff excepted.

Q. What was your trouble? A. Well, at first I didn't know what the trouble was.

Q. Where did it come? A. It began in the breast.

Q. Which one? A. In the right breast.

Q. Now, just tell us as quickly as you can how you first discovered it and what it did. A. Well, I discovered a small bump or lump in the breast. It had a very tender feeling when I pressed on it.

Q. Then what? A. It began to gradually grow larger, and the breast became swollen and quite hard. Then I began to poultice it, and that relieved it somewhat; and about six months afterwards it began to discharge.

Q. It broke, did it? A. It did not break—it discharged through the nipple.

Q. Oh, came through the nipple? A. Yes, sir.

Q. Now, what kind of a discharge was it? A. At first a watery discharge, slightly yellow tinge; then after a time it began to be streaked with blood.

Q. Well, what was the odor to it? A. Well, sir; there wasn't any odor.

Q. There wasn't any odor at that time? A. No, sir; not any at that time.

Q. Was there afterwards? A. No, nothing very unpleasant.

Q. Now, how long was that coming on you, Madam? A. Well, it was about three years, or a little over.

Q. How did you come to come down here? A. Well, two ladies from town had been cured of cancer in Kansas City.

Q. And you talked with them? A. I did.

Q. And they referred you to Dr. Johnson and you came down to be treated? A. Yes, sir.

Q. Were you treated by any other physician there at home? A. No.

Q. Well, now, tell us how long you were treated here. A. I was treated by Dr. Johnson a little over eleven weeks.

Q. And what was the result finally—what happened? A. Well, I was pronounced cured, and I have reason to think so.

Q. Did that thing come out—the cancer? A. Yes, sir.

Q. How did it come out? A. Well, it just dropped out.

Q. Kind of sloughed off—kind o' sloughed out and rolled out? A. Just came out.

Q. How large was it when it came out? A. Well, it didn't all come at one time. A part of it came, and a few days afterwards the rest—the whole lump came out.

Q. Now, how large was that whole lump? A. It was as large as the bowl of a table spoon.

Q. And was it oval shaped? A. Yes, sir.

Q. Like an egg a little? A. Yes, sir.

Q. And did it leave a large hole there where it came out of? A. It was quite a hole.

Q. Well, then, did it heal up afterwards? A. Certainly.

Q. Have you had any trouble from it since? A. Never.

Q. How long ago was that? A. Two years last March.

Q. Did he use a knife? A. No, sir.

Q. Did he apply medicines to it? A. Yes, sir.

Q. And did he give you a constitutional treatment too? A. He did.

Q. Was the nipple drawn in before you came to him? A. No.

Q. What condition was it? A. It was perfectly natural.

Cross Examination by Mr. Morrison.

Q. You don't claim to be an expert on cancer, Madam? A. No, sir.

Q. Have had no medical education so as to enable you to distinguish between cancers and other forms of tumors or growths? A. No; I don't claim to be a physician.

(Witness excused).

The further hearing of this cause was here adjourned until the following Monday, May 18, 1908.

Kansas City, Missouri, Monday, May 18th, 1908.

The hearing of this cause was resumed pursuant to the foregoing adjournment. Present as on the day of adjournment.

DR. DAVID H. RIEGLE, called as a witness on behalf of the defendant, having been duly sworn testified as follows

Direct Examination by Mr. Harkless.

Q. What is your name? A. D. H. Riegle.

Q. You are a physician, are you, Doctor? A. Yes, sir.

Q. Where did you graduate? A. Starling Medical College and Polyclinic of New York.

Q. In what class of the medical profession do you belong? That is, as to whether you are an allopath or a homeopath, or what? A. Allopath.

Q. Doctor, I will get you to state if you know Mrs. Harper? A. Yes, sir.

Q. Did you know her sister also? A. Yes, sir.

Q. I will get you to state if you made an examination of her sister, and also of her, with reference to the question of the cancer of the uterus? A. Yes, sir.

Q. I will get you to state what her sister died with.

Mr. Morrison. That's objected to. Her sister, as I understand, died with cancer. She was not treated by

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Mr. Harkless: I simply want to show that it was in the family. That is all, Mr. Morrison.

Mr. Morrison: That don't prove anything.

Mr. Harkless: I can't agree with you.

Q. I will ask you, in treating cancer and poison by cancer and its diseases, does the question of the history of the family and its diseases have anything to do with it, Doctor? A. Yes, sir.

Q. Now, you treated her sister, didn't you? A. Yes, sir.

Q. Now, do you remember what she died from? A. She died from cancer.

Q. Cancer of the uterus? A. Yes, sir.

Q. Her sister died with cancer of the uterus. Now, then, did you find out Mrs. Harper was also suffering from a similar disease? A. Yes, sir; the indications were she had the same trouble.

Q. That is cancer? A. Yes, sir.

Q. Where was it? A. In the uterus.

Cross Examination by Mr. Morrison.

Q. Now, Doctor, that is just as far as you can go—that the indications were that her sister was suffering from a similar trouble? A. Yes, sir.

Q. Are you a pathologist and expert in microscopic work, and that line? A. Why, I did follow that at one time, but not at the present time.

Q. At the present time you are in the general practice? A. Yes, sir; general practice.

Q. And when you have work of that kind to be done you consult a pathologist? A. Why, yes, sir.

Q. Dr. Hall is one? A. Yes, sir.

Q. And probably as eminent a man in that line as there is in the city, is he not? A. Yes, sir.

Q. And in diagnosing cancer, frequently it is very difficult to distinguish it from certain forms of ulcer and sometimes tumor? A. Yes, sir; very difficult.

Q. And when it comes to a question of distinguishing between these and cancer, why the only definite way

of arriving at a conclusion is to have a microscopical examination? A. Yes, sir.

Q. Now, for example, you take a cancer of the breast; say that a woman comes to you and there is a hard lump in the breast, and it is below the skin and there is no breaking through, or at any rate, it is not raw, but there is a hard lump in the woman's breast—now that might be adenitis? A. Yes, sir.

Q. Or Mastitis? A. Yes, sir.

Q. Or some glandular trouble? A. Yes, sir.

Q. And the mere fact that there is a hard lump down there in the breast is no definite indication that you have a cancer, is it? A. No, sir.

Q. Now, then, as a matter of fact, if you have one of these hard lumps, it may be either a malignant growth, or what you call a benign growth, or tumor? A. Yes, sir.

Q. Now, as a matter of fact, there are a large percentage of these hard lumps that are malignant growths when they come in the breast? A. Yes, sir.

Q. So the careful surgeon when he gets a lump of that kind may advise it to be cut out, in order to be on the safe side? A. Yes, sir.

Q. Now, when you get into this question of a cancer of the uterus, why, there, of course, there is great room for controversy there, isn't there? A. Yes, sir.

Q. And this woman had some trouble with the womb, and it was somewhat similar to the trouble that her sister had died from? A. Yes, sir.

Q. And yet, that you could not and would not undertake to say what it was—what the trouble was, would you? A. No, sir; I would not want to say definitely; but it resembled a cancerous condition.

Q. There was a lacerated condition of the womb, wasn't there, Doctor? A. I think there was.

Q. Coming from childbirth. That lacarated condition was due to childbirth? A. I have forgotten whether there was a laceration there, now, or not.

Q. And of course this trouble might have been an ulceration following that? A. Yes, sir.

Re-Direct Examination by Mr. Harkless.

Q. I will ask you what cancer of the uterus may come from? A. Various causes. I can't give any definite cause for cancer.

Q. It may come from any cause? A. Yes, sir.

Q. Now, did you examine this with what you call this instrument, this is a speculum, is it not? A. Yes, sir.

Q. So you could get into it and see it plainly? A. Yes, sir.

Q. No difficulty about seeing it as plainly as if it was on the outside? A. Yes; you could see the external portion of it very plainly.

Q. Just as plainly as you could on the outside? A. Yes, sir.

Q. Your best judgment as an allophatic physician, is that it was cancer?

Mr. Morrison: I object to that as leading and suggestive.

Objection sustained; defendant excepted.

Q. How long did you treat it, Doctor? A. I treated her several months; three or four months, I think.

Q. What did its condition seem to be? Did it seem to get worse? A. Well, I don't remember that there was much improvement in the condition; very little, I think.

Q. How large did it appear to be? A. Well, I couldn't give any size, it was a nodulated (?) inflamed condition, constantly bleeding, and the discharge strong smelling; and so far as size is concerned, you couldn't give any definite size.

Q. Was the odor what you consider the odor of a cancer? A. Yes, sir.

By Mr. Morrison:

Q. Now, when you speak of the odor of a cancer it is the odor that comes from any foul smelling sore? A. It is a strong, foul smelling odor from the decay of flesh.

Q. You get an odor like that from the cancer, and an odor like that from any sore? A. Yes, sir; any place where there is destruction of flesh.

Q. So as to odor it is not distinctive of cancer? A. No, sir.

Q. And even when you have a cancer before you and treat it, it is pretty difficult to tell what it is, sometimes? A. Yes, sir.

Q. Pretty hard to diagnose it? A. Yes, sir.

Q. And it is absurd to talk about diagnosing cancer from what some non-expert person writes you?

Mr. Harkless: I object to that as incompetent, irrelevant and immaterial and argumentative.

Q. Can it be done, in your opinion, Doctor, as a physician or surgeon—diagnose cancer by mail, would you say?

Mr. Harkless: That depends entirely on what the questions are and how thorough they are.

The Court. He may answer.

Defendant excepted.

A. It would be a pretty hard thing to do.

Q. And so far as your experience goes, it would be an impossibility, Doctor? A. Practically so.

By Mr. Harkless:

Q. Did you ever try it? A. No, sir.

Q. Did you ever treat many cases of cancer, Doctor? A. Yes, sir.

Q. Now, this treatment you gave this case, whatever you did give it, it ought to have yielded to the treatment, if it had been an ordinary sore, hadn't it?

Mr. Morrison: I object to that as calling for the conclusion of the witness, and as being very leading.

The Court: Yes; you are always asking leading questions, Mr. Harkless.

Q. Well, what do you say with reference to the question as to whether or not that would have any bearing on the question of determining in your mind, whether it was a cancer or not—making the treatment you did make and applying it as long as you did, as to whether or not that would influence your judgment as to the probability of what it was—the fact that it did not yield to that treatment?

Mr. Bland: We object to that because this is the defendant's witness and he is cross examining him.

Mr. Harkless: I am simply asking for his opinion on that subject.

The Court: He may answer.

Plaintiff excepted.

A. Yes, sir; that is what I made my diagnosis on —the persistency of those symptoms.

By Mr. Morrison:

Q. This speculum you spoke of, that is merely an instrument for dilating the vagina? A. Yes, sir.

Q. There is no glass or microscope attachments, or anything of that sort? A. No, sir.

Q. Just give you access? A. Yes, sir.

Q. Now, I want to ask you one thing before you leave the stand. You are a physician of the Allopathic School? A. Yes, sir.

Q. That is what is generally called the regular school? A. Yes, sir.

Q. And it is a recognized school of medicine, isn't it? A. Yes, sir.

Q. And I want to ask you if it is not a fact that the Allopathic School does not recognize any such thing as cancer poison that can be reached by internal treatment? That is, say for cancer of the stomach—taking an internal treatment?

Mr. Harkless: I object to that as to what allopaths recognize about it. I think they recognize a good many things, but we are not controlled by what they recognize or fail to recognize.

Mr. Morrison. No; but these gentlemen have asserted that the correct principle of their treatment and his treatment, is recognized by all schools of medicine. (Reading): "The correct principle of my treatment is recognized by all schools of medicine." Now, this gentleman represents, probably, the largest school of medicine.

Mr. Harkless: Are you claiming that his license ought to be revoked on that statement?

Mr. Morrison: We are trying the defendant for having made false and misleading statements.

The Court: That is what they are trying him for, false statements made in that circular, as I understand it. That is what I am trying him for now.

Mr. Harkless: Now, Your Honor, this is the first time that I have had any intimation from the court that that is what we are trying.

Mr. Morrison: That is what we have asserted all along.

Mr. Harkless: Just wait a moment. I want to say this is the first information we have had in this case, and we are now advised by the court that we are trying him for that. I understand the court, when he speaks of those statements, refers to this pamphlet marked Exhibit "C," and containing some thirty-nine pages.

The Court: That is what I understand, yes.

Mr. Harkless: Now, if the court please, the issue in this case now, of course, becomes endless. If every allegation in this pamphlet is said to be false, and he is to be charged with everything contained, or anything in

the pamphlet they want to pick out, I want to insist, Your Honor, that the defendant should now be advised as to whether it is to charge us with every statement in here as being untrue, or whether they should state there are some particular ones, and thus enable the defendant to meet those charges.

The Court: They have made their case, Mr. Harkless, and you can rely upon what they have put in as the scope of the inquiry.

Mr. Harkless: Your Honor has not yet read this testimony (referring to the testimony in connection with the transcript of proceedings first offered by plaintiff).

The Court: Of course, I have not yet read it.

Mr. Harkless: We ought to try this case by some sort of rule. We ought to know what we are charged with. The testimony is not the charge.

The Court: The charge, as I understand it, is what is in that pamphlet. Now, they claim their testimony in that transcript indicates what they are seeking to show is false, and all I would require you to meet is what is in that. You know what is in that testimony.

Mr. Harkless: Why, I have read it, but I cannot tell a thing about what it is, and nobody else can. I say to Your Honor now, and it seems to me they certainly are putting Your Honor in a very embarrassing position, and I say that they have not advised you as to what they are charging us with as false, in that pamphlet.

The Court: They have not seen fit to read that record, but have put it in evidence and then stopped.

Mr. Harkless: How does Your Honor know the

charges there. You have not read it. You have not only not read it, but the demurrer to the evidence has been overruled, and now we don't know a single thing yet; and we are now advised this morning by the court that we are being tried for things in that forty-page pamphlet. That is what I have been trying ever since this trial began—to find out what this charge was.

The Court: I can give you only my opinion about it.

Mr. Harkless: And does the court say that they have made a *prima facie* case as to everything contained in that pamphlet, and that we have got to disprove it?

The Court: I don't say that.

Mr. Harkless: Well, that is what I would like to know from the other gentleman, and would like to know from the court.

The Court: I have told you half a dozen times. They have made a charge against you of false statements in that book. That, I suppose, includes all the false statements in that book.

Mr. Harkless: Well, the false ones—what are the false ones?

The Court: Let me tell you again. There is a pleading here in which you are charged with false statements in that pamphlet. As I understand, that is all the false statements in there, whatever they may be. Now, they brought you before the Board of Health, and have put in testimony here as to what those false statements are. Now, in this proceeding they have offered that transcript in evidence, but have not read it yet to me.

Now, that is their case. You were there and know what they are.

Mr. Harkless: I was not there.

The Court: But you have read it?

Mr. Harkless: I have read it, yes.

The Court: Then you know what is in it. And now all you have to meet is what they have put in evidence on in that transcript. I don't know what it is, because they have not yet read it to me; but you do know, and you know what charges were made in the transcript, and all you have to do is to meet those.

Mr. Harkless: Then, Your Honor, is that evidence taken before that Board, does that constitute the charge?

The Court: No, not the charge, but the evidence of the charge.

Mr. Harkless: But it picks out certain things in the pamphlet; and I don't have to answer as to the things they have not picked out.

The Court: Certainly not.

Mr. Harkless: Then, their evidence constitutes the charge?

The Court: No, the charge is in the petition, but the transcript is the evidence they have introduced here. Of course, you don't have to meet any charge in the pleadings if they have not put in any testimony to substantiate it. You meet the testimony, not the charge; you meet the evidence. That is all you have to do.

Defendant excepted.

By Mr. Morrison (continuing):

Q. Now, Doctor, in regard to cancer of the stom-

ach, your school of medicine treats that, and it can be alleviated in some cases by removing a portion or sometimes all of the stomach; is that correct? A. Yes, sir.

Q. And that is the only thing that can be recognized for cancer of the stomach, and that is merely alleviative?

Mr. Harkless: I object to that as incompetent, irrelevant and immaterial. We are not charged with what he has done.

Mr. Morrison: The defendant says his treatment is recognized by all schools of medicine, and I want to find out whether this treatment is given.

Mr. Harkless: You are mistaken about his having said that. He has not answered your question.

Mr. Morrison: I say, it is merely preliminary. I am trying to reach the proposition in your pamphlet. Your man says his treatment is recognized by all schools of medicine.

Mr. Harkless: That don't constitute any fraud or wrong if he did. That is a mere matter of conclusion. That is no cause for removing anybody, if it is so.

Mr. Morrison: I think it is important because this man is seeking to create the impression that he has a recognized treatment, and I think it is important to show that he has not.

Q. Now, with regard to your school of medicine, the Allopathic School, does that school recognize any other treatment than this?

Mr. Harkless: That is objected to. There's no such charge. Nothing here that any such charge could

have any reference to, and even if there was, it would be wholly incompetent as to what the school considered it. We are not trying that issue here at all. I don't understand that is charged against us, and if it was, it don't constitute any offense—what a man may say about it. He may have his opinion.

The Court: He may answer.

Defendant excepted.

A. Yes, sir; the surgical treatment is the treatment recognized.

Q. And that is the only treatment you recognize for the treatment of cancer of the stomach? A. Yes, sir.

Mr. Harkless: I object to this last question and answer as incompetent, irrelevant and immaterial, and I move to strike out what he recognizes and what his school recognizes. It is immaterial. We are not trying any such issue.

Q. Of course, you understand I am inquiring as to your school of medicine, and did in that question? A. Yes, sir.

Q. And the Allopathic School of medicine does not recognize an internal remedy for cancer, or the removal of the cancer poison, so-called, by constitutional or specific remedies taken internally, does it, Doctor?

Mr. Harkless: That's objected to as wholly incompetent and immaterial as to what they recognize about it. Whatever he said upon that subject cannot constitute dishonorable conduct in any sense, or be any cause for revoking a man's license.

The Court: The question is whether he represents in this work that this treatment is well recognized by all schools of physicians.

Mr. Harkless: There is no evidence here that the treatment is not a proper one.

Objection overruled; defendant excepted.

A. No, sir; it does not.

Q. Doctor, cancer of the liver is not curable, is it?

Mr. Harkless: That's objected to as leading and suggestive.

Objection overruled; defendant excepted.

A. No, sir.

Q. Cancer of the stomach is not curable?

Objected to by defendant as leading and suggestive and asking for the mere conclusion of this witness.

Objection overruled; defendant excepted.

A. No, sir.

Q. Deep seated cancers of the rectum are not curable, are they?

Objected to by defendant for all the reasons heretofore stated, and because it allows him to make up his opinion on what "deep seated" is.

Objection overruled; defendant excepted.

A. No, sir.

Q. Are cancers of the ovaries, or cancers of the brain, or cancers of the intestines curable, Doctor?

Mr. Harkless: I object to that as wholly immaterial. There's no such issue as that in this proceeding,

and if there was it would be incompetent, irrelevant and immaterial.

Objection overruled; defendant excepted.

A. No, sir.

Q. Those are all forms of cancer, are they not, Doctor?

Mr. Harkless: That's objected to as incompetent, irrelevant and immaterial. You may ask him to give the different forms, but I object to that question.

Question withdrawn.

Re-Direct Examination by Mr. Harkless.

Q. Then, Doctor, your idea is that the Allopathic School does not recognize anything but cutting for cancer? A. Pallative treatments sometimes relieve, but cutting is the only thing that will give permanent relief.

Q. That is, you think no kind of cancer is curable except by cutting? A. Not even then.

Q. Not even then? A. No, sir.

Q. Then you think no cancer can be cured? A. Yes, sir.

By the Court:

Q. Wait a moment. I don't understand that answer. A. I had reference to what he was speaking about. There are forms of cancer—skin cancer—that can be cured by removal.

By Mr. Harkless:

Q. How? By removal.

Q. Well, in what way? A. Cut out.

Q. Well, is there no other way of doing it? A. None recognized.

Q. Well, what do you mean by recognized? Do they do it? I am not talking about what you recognize.

Mr. Morrison: I object to that because it is improper cross examination of his own witness.

Mr. Harkless: This is the only man I could put on to prove this treatment.

Q. What do you say as to whether cancers are cured every day without the knife? A. I don't know anything about it; I have not seen any.

Q. But what you mean to say is your school don't recognize it even if they do? It is not recognized by the Allopathic School, even if they are cured by these specialists?

Mr. Morrison: I object to that.

The Court: That is going pretty strong with your own witness.

Mr. Harkless: I will withdraw the question.

Q. I will ask you if it is not a fact, Doctor, then, that the Allopathic School don't recognize the cure of any cancer by advertising specialists?

Mr. Morrison: I object to that as incompetent, irrelevant and immaterial and cross examination of his own witness.

Objection sustained; defendant excepted.

Q. Well, then, is it true, Doctor, or not, that the Allopathic School does not recognize that there is any cure for cancer except with the knife? A. Yes, sir.

Q. That is their theory? A. Yes, sir.

Q. Now, then, suppose in a case where it was cured by other means, without the knife, all you mean to say is that even though that was true, the Allopathic School will not recognize it?

Mr. Morrison: I don't catch that question.

Mr. Harkless: I would like to have him answer that question.

The Court: I will sustain the objection to that question.

(Witness excused.)

NOON RECESS.

The Court: I see no occasion in this case for bringing more witnesses here to prove that this defendant has cured cases of cancer.

Mr. Harkless: That is hardly the question.

The Court: What more do you want?

Mr. Harkless: I thought you would declare you had found from the evidence that he has cured them.

The Court: I am willing to find from the testimony that has already been offered, that he has cured cases of cancer.

Mr. Harkless: In view of the court's announcement, I will state that while we have a large number of other witnesses here to prove the cure of similar cases of cancer to that already in evidence, I will not use those witnesses, but confine the cases of cancer to cases of cure of cancer of the uterus, the stomach and the rectum.

CHARLES W. MOSS, called as a witness on behalf of the defendant, having been duly sworn, testified as follows:

Direct Examination by Mr. Harkless.

Q. Now, Mr. Moss, where do you reside? A. I live in the town of Atkinson, Nebraska—northern Nebraska.

Q. How old are you? A. Sixty-six my last birthday, last November—no, sixty-five my last birthday.

Q. I will get you to state, Mr. Moss, if at one time in your life you were troubled with some rectal disease—trouble with the rectum? A. I was, yes, sir.

Q. What was it?

Mr. Morrison: Now, if Your Honor please, one of these questions, when you get into the question of cancer of the stomach, of the rectum, and so forth, it seems to me, is the question of diagnosis. That, it seems to me, should be first settled. Now, they have been putting in all this stuff a little backward, and as I said at the outset, conceding as we do in this case at least, that some of these simple forms of cancer can be cured, I have not felt like making very strenuous objections. But, now, with Mr. Harkless going to confine his proof to these forms, it seems to me it is important to have the question of whether it is cancer——

The Court: Of course I don't give very much weight to the statement of a layman who says he has cancer. All he knows about it, of course, is what somebody told him; and I don't give very much weight to that. He can name it that if he wants to, but that does not make it cancer.

Mr. Harkless: No; but we have a microscopical examination of this case, I think.

Mr. Morrison: I insist this ought to go in in proper order. It leaves us wholly in the dark to do otherwise; and if Your Honor should find, for example, in favor of our contention in this case, and it should be appealed to the Supreme Court, they might think this was some proof when Your Honor would not admit it.

The Court: Well, I have been letting it go in, and I don't care to change the ruling now. I may strike it all out at the end of the case.

Mr. Harkless: I don't suppose it concludes Your Honor at all.

By the Court:

Q. All you know about it is what somebody has told you as to what it was? A. Why, I am no surgeon or physician at all. Of course all I know is what people have told me and what I have read in regard to that trouble, and the suffering.

By Mr. Harkless: Q. Now, how long were you suffering with it? How long did you have it before you were treated? Were you treated by Dr. Johnson? A. I was treated by Dr. Johnson, yes, sir.

Q. How long were you afflicted before you were treated? A. About twelve years; I have been more or less afflicted with piles—what the doctors called piles—

Q. To start with? A. Yes—for about twelve years.

Q. Yes; and then finally what did you discover in reference to it, finally? A. About eighteen months be-

fore I came to Dr. Johnson I went to Illinois to my old family doctor and was operated on for piles—hemorrhoids. He burned it out at both sides with an electric wire, and one side seemed to get well, and the other side did not.

Q. Then what? A. I lingered along then for about—oh, not quite eighteen months. My memory is, I came to Kansas City the last day in February, four years ago. I came to Dr. Minor by the recommendation of a friend of mine, for treatment for rectal trouble.

Q. Well, did they make an examination of you? A. Yes; they made two examinations. They made what they called an office examination, the day I got there—one of Dr. Minor's assistants did; and he said it was not satisfactory. He said there was more trouble there, he thought, than he could get to without my taking chloroform and having a microscopical examination; and Dr. Minor's assistant there, Dr. Sulzbacher, his name was, they advised me to go to the hospital; and I went down to the German Hospital to rest there and take a little treatment, and Dr. Minor told me that in two or three days when I rested up a little they would give me an examination under chloroform, what he called a microscopical examination.

Q. Well, did he do that? A. Yes, they did that.

Q. Now, then, what did they say to you? What did they pronounce it?

Mr. Bland: I object to that as calling for hearsay testimony.

Objection sustained; defendant excepted.

Q. Well, at least you were not treated, then, any more for rectal troubles, were you, there? Were you recommended to go to a cancer specialist?

Mr. Bland: That's objected to as calling for hearsay testimony and as leading and suggestive.

Objection sustained; defendant excepted.

Q. What did you do then next? A. Next after examination?

Q. Yes. A. Why, after examination he reported —it was about three days after the examination before he reported that he could find it. He told me that——

Objected to by plaintiff.

The Court: We don't want what he told you.

Q. Well, as the result of what he told you did you go to some place else to be treated?

Objected to by plaintiff as incompetent, irrelevant and immaterial.

The Court: I think that is all right.

Plaintiff excepted.

By the Court:

Q. What did you do after that? A. I thought if I had cancer of the rectum I would go to a cancer specialist.

Mr. Bland: I move to strike that out as incompetent, irrelevant and immaterial.

Q. Well, did you go? A. I went, yes.

The Court: We don't want what you thought, but what you did.

A. (continuing) Well, that is what I did; that was my thought, and I did.

By Mr. Harkless:

Q. Now, did they advise you to go to a cancer specialist?

Mr. Morrison: That's objected to as leading and suggestive and hearsay and calling for his opinion.

Objection sustained; defendant excepted.

Q. Did they refuse to treat you?

Objected to by plaintiff for the same reasons.

Objection sustained; defendant excepted.

Q. Well, you went to a cancer specialist? A. Yes, sir; I went to Drs. Bye and Johnson.

Q. Now, how long ago was that? A. That was about the 14th or 15th of March, 1904—four years ago.

Q. Now, I will ask you to state, Mr. Moss, what the operation—or rather, in talking with them was there an operation proposed? A. Talking with whom?

Q. Talking with Minor. A. They advised an operation.

Objected to by plaintiff as hearsay.

Mr. Harkless: I want to show the character of the operation advised.

Mr. Bland: We move to strike out the answer as incompetent, irrelevant and immaterial.

The Court: Are you talking about the recommendation of Dr. Minor?

Mr. Morrison: Yes; that is what the question is about.

Objection sustained; defendant excepted.

Mr. Harkless: What I want to prove is that they recommended that he be operated upon, and that a tube

be put in his side to draw off this cancerous condition until they could operate on him with a knife.

The Court: I don't care what they advised; but their opinion as to his condition would, of course, be competent, but they are the people to be here and tell what that is. They are here in town.

Q. Now, then, after you went to Dr. Johnson, how long were you treated by him? A. Somewheres about two months and a half—that is personal treatment; office treatment, you understand.

Q. And then how long were you treated after you went away? A. I went away then, and continued that treatment at home, and I got so I could use the treatment myself, and I went home and used the treatment myself.

Q. Now, then, Mr. Moss, I will get you to state when you got through with the treatment with them, or rather after you had been using this treatment, whether or not, so far as the cancerous condition is concerned, you were relieved from the trouble. If so, how long ago?

Mr. Morrison: That's objected to because it calls for the conclusion of the witness, and a matter of opinion and he is not qualified to testify.

The Court: He may state whether or not he got well.

Plaintiff excepted.

A. Why, I got relief.

Q. You know that? A. I know that, and I know I was in a condition that I had to have help to climb the stairs. I was down to a hundred and forty-one pounds in weight, and my strength was gone; but I got so I could

go home and attend to my little affairs at home on the farm.

Q. And your strength returned? A. My strength returned. I am carrying now about twenty to twenty-two pounds of flesh more, winter and summer, than I were then.

Q. And how long ago has that been? A. Four years ago this last spring—last March, that I came there.

Q. What is your business? A. I am a farmer and ranchman, as we call it up in that country. I live in the edge of the cattle country up there, and we farm and raise cattle. I am living now in town. I quit the farm last fall and am living in town; but I am still interested in a little cattle business there.

Cross Examination by Mr. Morrison.

Q. Was there some paste or stuff, or something like this, applied to this sore? Didn't this doctor apply some sort of salve or paste? A. Dr. Johnson, you mean, and Dr. Bye?

Q. Yes. A. Why, the principal treatment was an injection of medicated oil, as I understand it. That was the principal treatment. That was the treatment that gave me the quickest and most relief. They had medicines and applied salve to my lower abdomen, because I was bothered there with gastric colic, so that I couldn't hardly live sometimes without lying down on my back and kneading it there in order to get rid of it. But they applied that injection to my bowel; that was the principal rectal treatment.

Q. You had a case of piles for a number of years? Are you a little hard of hearing? A. Why, not very; but I am not used to this noise.

Q. You say you had piles for about twelve years? A. About twelve years prior to the time I came under Dr. Johnson's treatment.

Q. And about eighteen months before that time you were operated on for piles in Illinois? A. Yes, sir.

Q. That operation was by your old family physician? A. Yes, sir.

Q. And one place did not heal up very well? A. One side seemed to heal, and the other did not.

Q. One side? A. Yes, sir.

Q. The treatment of that was what Dr. Johnson finally undertook? A. Yes, sir. That stayed there, and after a time it seemed to enlarge and get sore and it got to be so large that it hindered the passage of my bowels.

Q. I say, that is what Dr. Johnson afterwards treated? A. Yes, sir.

Q. And it healed over? A. Yes, sir. It got so it was bleeding, and a passage of mucus.

Q. You mean a discharge of some kind? A. Yes, sir.

By Mr. Harkless:

Q. What kind of an odor came from that sore? A. Why, it was very offensive, such that I never had experienced before. I don't know that I could describe it, other than it was something that I never had experienced before.

Q. I wish you would describe generally its pain and

what pain you had, and under what circumstances? A. Well, the worst pain that it gave me was first a gastric colic in the lower, or what the doctors call the colon, a bowel—and besides that the worst pain was in the passage of the bowels. I could not pass my bowels without lying down on my back sometimes and kneading the bowels to get a passage. The obstruction seemed to be such, and that was very painful.

(Witness excused.)

Mr. Morrison: I want to recall Dr. Riegle for further cross examination.

DR. D. H. RIEGLE, recalled as a witness on behalf of the defendant, for further cross examination, testified as follows:

By Mr. Morrison:

Q. When you were on the stand before, you spoke about this Mrs. Harper, I believe the name was. A. Yes, sir.

Q. I want to inquire of you in regard to the use of certain arsenical compounds. Do certain arsenical compounds and other caustics have their use in the treatment of superficial cancers, and have been known for a great many years, running back, in medicine?

Mr. Harkless: I object to that as wholly immaterial for the purposes of this case.

The Court: I think it is immaterial.

Mr. Morrison: There is evidence introduced that this Dr. Johnson has some of these arsenical pastes——

Mr. Harkless: Where is that evidence?

Mr. Bland here exhibits certain papers to Mr. Harkless.

Mr. Morrison: And the object of this evidence is this, that the use of this paste has been known from early history of medicine in the cure of superficial cancers. It just simply burns them out. It is simply a method of eradication, of which the knife is another form. I just want to ask some questions about that showing that there is nothing extraordinary in these compounds.

The Court: Does the transcript there show that that is what Dr. Johnson used?

Mr. Morrison: There is testimony that one of the doctors went up there, and Dr. Johnson showed him some of his remedies. Dr. Griffith said he was up there at Dr. Johnson's office, and they asked him (reading): "Q. Did he show you what he used for curing cancer? A. Yes, sir.

Q. What was it? A. I asked him if that was chloride of zinc paste, and he said it was, and I asked him where his arsenical paste was, and he showed me that. Then he said he had another combination paste, and he showed me that. Then he spoke of a fourth paste that he used on the inside of the mucus cavities of the mouth, and elsewhere, which he said was absolutely non-poisonous, but he would not say what that was. He said that was his secret. Q. Did you determine what it was? A. No, sir."

The Court: This question is whether this arsenical paste has been long known. What difference does it make?

Mr. Morrison: To show that there is nothing ex-

traordinary in the use of this "unknown remedy," and dispose of some of this mystery——

The Court: I have not seen anything mysterious about this. It might be wonderful because it was so well known.

Q. Doctor, is the removal of cancers by the knife generally preferred to the killing of them with caustics, the arsenical compounds with zinc chloride?

Mr. Harkless: I object to that as incompetent, irrelevant and immaterial. There's no such issue in the case.

The Court: I will sustain the objection.

Plaintiff excepted.

Mr. Bland: He claims in his book that the knife is a relic of barbarism and should not be used in any case, and that the result is always fatal. Now, we want to show that the burning out of these sores with pastes or caustics is another way of removing; but that the knife is the more perfect way, although the burning is practically the same.

The Court: I think the form of that question is objectionable.

By Mr. Morrison:

Q. What is the object of the use of these caustics such as arsenical compounds and zinc chloride?

Mr. Harkless: That's objected to. It is wholly immaterial. There is no issue in this case as to what their objects are, and no evidence definitely as to the ones Dr. Johnson used, if he did say that he applied them.

Objection overruled; defendant excepted.

A. The object is to destroy the growth.

Q. What is the difficulty which attends the use of these pastes and caustics in regard to the thoroughness with which they act?

Mr. Harkless: I object to that because it is referring to "these pastes," without any specification what they are.

Q. Well, in the use, now, either of the caustic or the knife, Doctor, what is the object that is aimed at, with regard to the cancerous tissue?

Mr. Harkless: I object to that as wholly immaterial.

The Court: He may answer.

A. Why, it is to remove the diseased portion there and destroy by burning or removing it with the knife. It is to get rid of that portion of the flesh that is diseased.

Q. And in one case you attempt to remove it with caustics, and in the other you attempt to eradicate it with the knife?

Mr. Harkless: That's objected to as incompetent, irrelevant and immaterial, and because there's no evidence that our people are using caustics at all, or that they are using the things he is using or ever did.

Mr. Morrison: I am speaking now with reference to the treatment in general.

Mr. Harkless: I still object to it for the same reason.

(No ruling).

Q. Chloride of zinc paste is a caustic, is it not, Doctor? A. Yes, sir.

Q. And these arsenical compounds are also caustics? A. Yes, sir.

Q. They burn? A. Yes, sir.

Q. In that way they kill the cancerous tissue? A. Yes, sir.

Mr. Harkless: I don't see why this is material. There's no evidence of their use here.

The Court: Well, Dr. Griffith's testimony given in the transcript is there, is to the effect that Dr. Johnson showed him some.

Q. Which, in your opinion, is the more thorough in eradicating the cancerous growth—cutting it out or burning it out with caustics?

Mr. Harkless: I object to that as wholly immaterial.

Objection sustained; plaintiff excepted.

Mr. Morrison: I think, if Your Honor please, it will have some bearing on these representations in the book.

The Court: I don't want to go into a discussion of the merits of the two forms of treatment.

Mr. Morrison: No, it is not offered for that purpose at all.

Q. In speaking of this Mrs. Harper, I noticed this morning that you did not say that she had cancer. I am correct in that, am I not—that you said you could not say she had cancer? A. I said she had a cancerous condition. She had symptoms of cancer, although I found no odor of cancer there; but she had the symptoms that go with cancer.

Mr. Harkless: What is that answer?

A. (continuing) Her symptoms indicated cancer, but I found no growth.

Q. You found no cancerous growth? A. No, sir.

Q. Sometimes you find ulcers frequently accompanied with symptoms such as pain and odor? A. Yes, sometimes they do in very aggravated cases—the discharge and all that; when they are aggravated, though, very severe.

Q. Yes. It might have been an aggravated sore ulcer—an ulceration? A. Oh, there was a possibility of that, yes, sir.

Q. And you did not find any cancerous growth itself, but symptoms—that there were some symptoms? A. Yes, sir.

Q. Which led you to think that there might be cancer there? A. Yes, sir.

By Mr. Harkless:

Q. Doctor, is it possible for it to have been smallpox? A. Possible, yes, sir; but I don't think so.

Q. It is possible that it could have been a sore or boil? A. Yes, sir.

Q. But your judgment is that it was a cancer? A. Yes, sir.

Q. Now, you say the sister did die with cancer? A. Yes, sir.

Mr. Morrison: I object to that.

The Court: We have been over that.

(Witness excused.)

DR. E. M. PERDUE, called as a witness on behalf of the defendant, having been duly sworn, testified as follows:

Direct Examination by Mr. Harkless.

Q. I wish you would state to the court what your literary education is, to start with, or has been. A. First, the common schools, then a graduate of Kansas Normal College, first in the science course—degree, Bachelor of Science—next in the classical course—degree, Bachelor of Arts—then after that the master's degree. Then a course in the Kansas City School of Law, admission to this bar in open court on examination.

Q. Now, I will ask you to state what your qualifications are, or what you have studied or been doing along the pathological line in medicine? A. I took the M. D. degree in Hahnemann Medical College in Kansas City, and I have occupied the chair of Histology, Bacteriology and Pathology in that institution for ten years; and have charge of the laboratory there.

Q. And what, with reference to microscopical investigations and examinations? A. Aside from my college work, after I left college I was a charter member of the Microscopical Society of Utah, at the time it was organized, and lectured before that society, and then my work has been with the microscope in the medical college here from time to time for this ten years, and besides teaching, I have conducted a great deal of research work —examinations and making of reports; and I wrote the Bulletin of the Missouri State Board of Health for July, 1904, on the prevalence of typhoid fever in Kansas City

after the flood, based on my examinations of city water; and have worked out new culture media for the growth of tuberculosis, and have worked at bacteriology, and studied the effect of formalin on the digestive fluids.

Q. Have you been an expert on various or any occasions for the State Board of Health? A. I have been a witness for the State Board of Health on numerous occasions.

Q. As an expert? A. Yes, sir.

Q. Before I forget about it, Mr. Perdue, were you in the court room the other day when Mr. McComas testified, or exhibited the bottle containing the cancer, or supposed portion of cancer? A. I was.

Q. Did you take that bottle from him immediately after it was introduced in evidence here? A. He gave it to me.

Q. Did you make an examination of the contents of that? A. I did.

Q. How did you make it—microscopically? A. Yes, sir, microscopically.

Q. Will you state what you found? A. I found an epithelioma.

Q. Which is cancer? A. Yes, sir, which is a variety of carcinoma or cancer.

Q. It is a variety of carcinoma? A. Yes, sir.

Q. Now, Mr. Perdue, have you sat here in the court room and listened to the testimony of these various twenty or twenty-five witnesses who have described the various kinds and character of diseases they had? A. I have.

Q. Supposed to be cancer? A. I have.

Q. Now, I will ask you if you, in your studies and qualifications, have become familiar with the ear-marks and symptoms of cancer, to some extent? A. I think I have; I have examined a great many of them microscopically, and have heard them oftentimes described by the patients and physicians, and I have read a large number of leading works on their appearance and clinical symptoms.

Q. Well, do you consider now that you are familiar with those things? A. Reasonably so, up to what we know today.

Q. Well, I suppose modesty would prevent your saying, more than anybody else, wouldn't it? A. I would not presume to say anything like that at all.

Q. (interrupting) Oh, yes, I believe you stated. Now, in listening to these various descriptions you have heard delineated on the stand here from the witnesses, I wish you would state to the court whether or not the symptoms that were described, or rather how they respond to the characteristic earmarks and symptoms of cancer—in what way they do, or differ—and which way they differ, if they do differ.

Mr. Morrison: That is objected to; I do not believe the witness has shown himself qualified to diagnose cancer.

Mr. Harkless: I am talking about the descriptions now.

The Court: He may answer.

Plaintiff excepts.

A. I would say they were classical descriptions of cancer.

Q. In its different forms? A. Yes, sir.

Q. Now, I will ask you, Mr. Perdue if, from a medical standpoint, if doctors or physicians sometimes are in the habit of referring to cancers in the way of different forms of cancer, and if so, state what is meant in the profession generally by the use of the words "forms of cancer," from a physician's standpoint, and as used in the vernacular of the physicians?

Mr. Morrison: The inquiry here is in what way laymen would understand it.

The Court: Well, I will hear his answer.

Plaintiff excepted.

A. The words "form" and "variety" as used by physicians and in the text books refer to varieties of cancer and kinds of cancer, and not locations of cancer.

Q. Well, now, "forms of cancer"—has no relation to the question of their location? A. None whatever; may be any kind, anywhere.

Q. But the physicians, and do the text book writers use it in that sense? A. They do.

Q. Now, does the word "form" have any reference whatever to the seriousness of the disease—the question of forms, as to whether it is a new form or an old one, ten months old, or ten years?

Mr. Morrison: I would like to understand. You are offering this as an explanation of the meaning of the first statement in that book, "Wonderful cure for all forms of cancer?"

Mr. Harkless: Yes.

Mr. Morrison: It is your claim that it does not cover all locations?

Mr. Harkless: Nor all degrees, but only forms.

Mr. Morrison: Then, as I understand, you don't claim you can cure all locations or degrees of cancer?

Mr. Harkless: Well, I think our man would, but he has not claimed it in this pamphlet you have produced.

Mr. Morrison: You think the pamphlet does not claim that?

Mr. Harkless: Why, I know it does not; I am not contending, though, that he cannot cure them, but I say, in that pamphlet he has not said he could cure them. I think he has been too modest about it, as shown by this testimony

Q. What do you say to that, Mr. Perdue? A. "Form" does not refer to the degree to which the cancer has advanced, or to its age.

Q. Now, what are the forms of cancer, or leading forms? A. Cancer and carcinoma are absolutely synonymous; one term does not qualify another; it does not even shade off; the meaning of cancer and carcinoma are absolutely synonymous.

Q. What are the different forms of carcinoma? A. They are classified clinically and classified pathologically, or miscroscopically. Clinically they are spoken of by the clinical diagnostician or the physical diagnostician as being hard cancers scirrhus, and soft cancers—

Q. (interrupting) And skin? A. And skin cancers, or sometimes called epithelioma.

Q. Now, then, you are speaking from the clinical standpoint? A. Yes, the appearance of them and the history of them, and the way they feel, and the way they are located.

Q. Now, from the microscopical standpoint. A. Now from the microscopical standpoint, carcinomas first are divided into atypical overgrowths of epithelioma, of the embryonic type. Now, epithelioma would be a carcinoma in the stratified epithelium. That is, the epithelium of the skin, of the mouth, of the esophagus down into the upper end of the stomach—all over the skin, and commencing again in the rectum. That is the epithelium. That is stratified because it is subject to wear. Now, a cylindrical called carcinoma is another which is found in the glandular organs, where there is only one layer of epithelium—unstratified—and the cells are cylindrical in shape. Now, sometimes we have a form called medullary, because the cells run along like a core—medulla, or core. And sometimes that form is so soft that it is given the term encephaloid, which has been used here. Now, those are the forms of carcinoma. They are malignant; that is, they tend to recur after they are extirpated, and also generally there is metastasis; that is, that there are little cells that break off and get carried along in the lymph channels and get lodged some place else, and grow a new cancer.

Q. Now, while you are there, something was suggested the other day by the court during the trial of the case, about this blood theory—that the blood produces the cancer, or rather, the cancer produces the disease to the

blood. Now, will you tell us about that? A. It is not definitely known that cancer cells would be distributed by the blood. Some authorities think so. I think the weight of authority is that they are distributed by the lymphatic channels.

Q. What do you think, you say? A. I think it is lymphatic. But a cancer, and also a sarcoma, which is not a cancer, but is a malignant tumor—both have this effect on the blood, or some parts of the system. They seem to elaborate a poison which, when the cancer is well advanced, destroys the power of the stomach to secrete hydrochloric acid. That is one of the most important elements in digestion. A person with a cancer or sarcoma does not digest the food, although he may have a ravenous appetite. The digestion and assimilation are important—and they thereby take on a yellow appearance, and have what is called cachexia. Sometimes there is a drawn appearance, as one of the witnesses testified here—the one who had the big cancer on his neck.

Q. Now, while you are there on that subject of cancer of the stomach, I wish you would state, now, what are the symptoms of cancer of the stomach, and tell us, now, how is it possible to treat that? A. Well, now, I am not much of a physical diagnostician. I do clinical and laboratory diagnosis, but——

Q. (interrupting) How do you find out a man has cancer of the stomach? A. Well, in the first place, if the cancer of the stomach has progressed so that the physician can feel it, by putting the man upon his back, upon (with) an empty stomach, feeling all around there

until you come to the bunch, and can get it up and feel how hard it is, and how it feels. If there is a sore place, or an area on the front of the stomach, it may be hard around the edge; it may be an ulcer, or it may be a cancer. Then a rubber tube, bearing as large an electric light bulb as can be thrust down the throat is thrust down into the stomach. It has a powerful light, and lights up the stomach, and you push and pass the light around, and if it comes to a little place that is dark, that would indicate a place that would be indicative of cancer; but if the middle of that place is lighter than all the rest, it is indicative down there of a gastric ulcer, which has worn away the thickness of the tissues and left it lighter there. And then cancers mostly of the stomach are at the lower end, and the larger ones finally produce stenosis of the pylorus, or the lower end of the stomach is stopped up, so that with difficulty the food passes. To arrive at that, the patient is laid on the back, and the light arranged tangentially—that is, so the light shines across the surface of the abdomen—and the physician gets on the other side of him and brings his eye to that level, and watches for the peristaltic motion of the stomach, which will run as a wave across the stomach from left to right. He can see the shadow of that wave cross the stomach from left to right. Then if there be a cancer, and it has developed to any advanced stage, it will have inhibited the secretion of hydrochloric acid in the stomach, and a test meal is administered, generally of some toast and water—something that is simple. And that is left a proper length of time—an hour or so—for

the gastric juice to be pretty well secreted, and then it is pumped out by a stomach syphon, and that is examined chemically for the presence of hydrochloric acid. If the hydrochloric acid be below one-tenth or two-tenths of one per cent, or be absolutely lacking, it is one of the strong indications of cancer. If it be above two-tenths per cent, it is an indication of gastric ulcer. Gastric ulcer is high in hydrochloric acid, and gastric cancer low.

Q. Now, is there any way of knowing, except after a fellow is dead, and they cut him open, to know that he had cancer definitely, or to know that you have cured him definitely? A. A microscopic diagnosis in stomach cancer, in the majority of cases, is post mortem; the few others are post operative.

Q. You can cut him open and find out then whether he had cancer or not? A. Yes, sir.

Q. You may know that even before he dies, may you not? A. That is, if they make the operation—post operative, or if they make an exploratory incision, which amounts to the same thing.

Q. Now, suppose you found a case, as you have described them being atypical, of cancer or stomach cancer, and after treatment for a time, those symptoms have disappeared. I will ask you to state if there is any better proof of the cure of cancer of the stomach than that, unless you cut him open? A. We don't know of any.

Q. Now, is there a marked distinction, and if so, state what it is, that demonstrates to the expert mind the difference between an ulcer and a cancer of the stomach? A. There is.

Q. Well, now, just explain that. Something has been said here that they don't know the difference between cancer and ulcer? A. The difference in appearance under the electric light that I have just described.

Q. Yes—that is one of them. A. And a difference in the feel, because the cancer is always thicker and harder. The difference, also, that the ulcer does not produce pyloric stenosis or occlusion of the lower end of the stomach, and that the gastric ulcer has what is called hyper-acidity, while the cancer has hypo-acidity, or too little, or none at all.

Q. Now, which produces the greater degree of emaciation, usually? A. In advanced stages, the cancer—and also the cachexia.

Q. Now, what figure does age cut in this respect? A. True cancers—the great majority of them—occur past middle life.

Q. How about ulcers? A. They may occur any time.

Q. A child will run around with an ulcer, won't it? A. Yes, sir.

Q. Now, with reference to the history of the case—family history—what have you to say to that? A. There are a great many theories as to what is called by the physicians the etiology of cancer—that is, the way it comes—the cause of it? One prominent theory is heredity in the family; another is geographical location, and the kind of water in certain geographical locations. It is historical to the profession that the western counties of New York have a great many cases of cancer, and

there is a great cancer hospital at Buffalo organized for the natives of that part of the country.

Q. That is the water? A. The water, and local conditions there.

Q. And that bears prominently upon the subject? A. That is one of the theories, yes, sir. And another theory is that the cells are rudimentary or embryonic. It is called the inclusion theory. That is, that some cells are not properly developed in the body somewhere as at the meeting of where the skin and mucous membranes of the eye, lip and nose commence and down where there are two kinds of epithelium back in the throat and back of the tongue, and half way down the esophagus and at the rectum. That is the inclusion theory. And then another is the disturbance of the physiological balance theory. That is that normally in the body the cells of the body only grow so thick. The skin only grows so thick, for instance; but that for some reason the physiological balance is broken, and some kinds of cells overbalance, and produce the condition. Those are some of the theories.

Q. Now, you spoke of there being a recognized and prominent theory that cancer was hereditary. I will ask you if that is true of ulcers—if they are regarded as a hereditary disease? A. Ulcers are caused by some form of bacterial infection. Anybody can have them.

Q. No more hereditary than a boil? A. Simply a form of boil—a boil on the surface.

Q. Now, there has been some reference to spindle cancer; what is that? A. Well, cancers or carcinoma

are all epithemial. They only have a little connective tissue. Sarcomas are connective tissued, and spindle celled. There are two varieties of sarcomas; there is the small spindle cell and the large spindle cell; and there is the small round cell and large round cell; and then there is the melanotic or black sarcoma that has been spoken of here. That is not a black cancer, but a black sarcoma.

Q. Now, let us take the class where an expert, Mr. Perdue, is satisfied that cancer exists, and yet it is not visible; what is the evidence of its cure? A. Its disappearance.

Q. But it cannot be seen, and how, then, do you know it has disappeared? A. By palpation—feel it.

Q. And the man who would best know would be the man who actually has the disease?

Mr. Morrison: That is objected to as leading and argumentative.

Q. Well, would his improved condition of health also be a good sign? A. A very good sign.

Mr. Morrison: I object to that as incompetent, irrelevant and immaterial, leading and argumentative.

Q. Now, I want to ask you, what would you say in reference to the improvement in the conditions of the health.

Mr. Morrison: That is objected to as incompetent, irrelevant, immaterial, leading and suggestive.

Objection overruled.

Plaintiff excepted.

A. I would say that if a cancer had progressed

so that the patient had what is called the cancer cachexia —that is, the yellowness and paleness and inability to digest his food—and that disappears, that the simple fact of ability to digest food would be indicative of cure as much as the disappearance of the tumor.

Q. Now, how is a microscopical examination made? A. A piece of the tumor is excised from the patient, or taken from the tumor after operation, and is cut first into a suitable size, about three-quarters of an inch across and about one-eighth of an inch thick, and placed, after washing, in a solution of about ten per cent formalin, or in a strong alcohol, .85 or above, depending upon the softness and thickness of the tissue. It is left there a day, or from a day to a week. It is taken from the formalin and placed in absolute alcohol about a day; then from the absolute alcohol into equal parts of absolute alcohol and ether of the best quality, a day; and from that into a mixture made up of equal parts of absolute alcohol and ether, in which is dissolved sufficient of gun cotton or celloidin, a different name for the same thing, to make it about the consistency of oil. The specimen is left in that from one to three days, and then transferred from that to a thicker solution of that, pretty nearly as thick as molasses, and left as long a time as one to three days, and then taken from that and placed upon one of these little circular tiles, such as are used in bathroom floors, stuck upon that with the thick celloidin, and left in the air, so that it is just firm enough so that it won't slip off, and is placed for a day or two in seventy per cent solution of alcohol. It becomes hard in

that length of time, and will cut like a piece of paraffin. Then we place that in the microtome, an instrument for cutting very thin sections, with a knife as sharp as a razor blade, and with a gauge for running up the specimens, so as to cut them from ten to twenty microns thick—so thin they are transparent.

Q. Is that the way you did this sample? A. Yes, except it had been through the alcohol, so I did not have to do that, and did not take the time. Then I cut a section off of that, and placed it in distilled water first, and then in a stain called hematoxylin, which is a preparation of logwood, and then from that into tap water, which sets the stain—then from that into one of the analine dyes, called eosin—a red stain. Then it is washed in water, and dehydrated in alcohol, and then cleared in a mixture of equal parts of cedar oil and carbolic acid, and then put upon the slide and covered with Canada Balsam, and a cover of glass placed over it and pressed down, and it is ready to look at it.

Q. Is that the end of it? A. Yes, that is the end of it, except diagnosis after that.

Q. Now, what is the diagnosis of cancer? A. The diagnosis of cancer is an atypical arrangement in nests and bunches of epithelial cells.

Q. Now, will you tell us, Mr. Perdue, why it is, in the treatment of cancer, a constitutional treatment is recommended, if it is recommended, by prominent physicians upon this subject? In the first place, let me ask you, is that recommended? A. It is.

Q. By eminent physicians and men of learning—

A. By eminent authors. Most of my knowledge about that is by reading eminent authors.

Q. That is what I mean, eminent authors upon that subject. Now, what is that constitutional treatment for, and what is the result? A. It is to restore the proper conditions of digestion and assimilation, where these have been disturbed, as I said a while ago, by the lack of secretion of hydrochloric acid.

Q. Now, what effect does it have upon aiding the cure of the disease? A. It restores the patient's strength and resisting power.

Q. And gives Nature a chance? A. Yes.

Q. Now, Mr. Purdue, I will ask you whether or not in the reading upon this subject you find that there is a great variety of opinion upon the question as to what is the proper remedy for cancer, and as to whether there are many, and many different kinds of treatments recommended?

Mr. Morrison: That is objected to as leading and suggestive.

Objection overruled.

Plaintiff excepted.

A. There are.

Q. Now then, Mr. Perdue, from your knowledge and experience in these matters I will get you to state if it is not a fact that along within the last few years writers have been giving attention to the cancer subject from the pathological standpoint?

Mr. Morrison: That is objected to as leading.

The Court: Well, I will let him answer.

Plaintiff excepted.

A. There has been a great deal written, especially in the medical journals.

Q. Well, how lately has there been much discussion of this subject? A. Right up to date.

Q. And it is still being discussed right up to date? A. Yes.

Q. Now, I will ask you whether or not it has only been in recent years that the medical writers—prominent men—discussing the matter in writing about it, have been discussing the question of curing cancer by means other than the knife? A. No, I think the history of the so-called selective escharotics runs back for a number of years.

Q. What do you mean by that? That kind of gets me? A. Pardon me for using that word.

Q. Well, it is all right; but what does it mean? A. That means different kinds of drugs, either vegetable or mineral drugs, that will kill the cancer cell without killing the healthy tissue around it.

Q. It has only been of recent years, until they got to writing on that subject? A. Well, I think it was taught some years back.

Q. But it has been put into practice more recently? A. There has been quite a renewal of it.

Q. Now, originally it was supposed that the knife was the only means of treating the cancer, wasn't it, or almost the only one? A. I don't believe I can state it just that way, it is the favorite means of the surgeon. The medical man prefers the other method.

Q. Yes; surgery runs to using the knife for that purpose, and medical men prefer the other means? A. And the patients, too.

Q. And the patients. Well, now, isn't the knife regarded as somewhat obsolete in its character—a little barbaric?

Mr. Morrison: I object to that.

Q. But isn't it regarded as rather a cruel treatment?

Mr. Morrison: I object to that. Counsel is just asking a succession of these leading questions.

The Court: I will sustain that. In fact the last hour has been very interesting, but I have been trying to think how it was going to help the court decide the case.

Q. Well, I want to ask you this question: Isn't it true that the allopaths more largely adhere to the knife system in the treatment of cancer? A. I don't think I can say that, except the surgeons of any school; the medical men throughout the profession teach the other means; dermatologists of the other schools teach the other method right here in Kansas City.

Q. What school—you mean allopathic dermatologists here? A. Yes, that is what they tell me.

Q. And do they teach it in yours, and did they teach it in yours? A. Teach both, yes, sir.

Q. Teach both systems? A. Yes, sir.

Q. Do they cure cases? A. I have seen junior students cure cases.

Q. By what method? A. By application of selective escharotics.

Q. Or drugs, rather than the knife? A. Yes, sir, no knife used at all.

Q. Now, then, you have had some general knowledge in the treatment of this cancer business. I will ask you whether or not you know whether all forms of cancer are being cured throughout this community by specialists in that line? A. I think they are.

Q. You think they are? A. Yes, sir.

Q. I want to ask you one other question. I want to ask you if there is not also a system resorted to now largely by prominent physicians and men skilled in the line, by the use of electricity? A. Yes, sir; they are prominent now.

Q. Is that what is called the X-Ray? A. X-Ray, yes, sir.

Q. By the X-Ray system? A. Yes, sir.

Q. Now, is there another system also recently advanced of curing them by what is called a radium system? A. That appears very prominently in the later medical journals.

Q. That is being considerably discussed also? A. It is.

Q. Now, I want to ask you if it is not true that in this recent period a great deal of discussion is going on throughout the country among men and medical journals in regard to this new idea of treating the cancer? A. A great deal; they are full of it.

Q. Now, I will ask you if you know something of another system, which is recommended by prominent physicians, by which they try to set up a case of erysipe-

las, on the theory that it absorbs the cancer poison and kills it? A. There is a theory that the toxins of certain virulent bacteria counteract the toxins, or whatever you may call it, of cancer, or counteract the cell growth of cancer; and the bacillus of erysipelas has been used for that purpose, and also, I believe, the bacillus prodigiosus.

Q. Now, I will ask you, whom do you regard as one of the most prominent authors upon cancer? A. The only author that we have discussing that subject alone in America is Dr. Gottheil.

Q. This gentleman, Gottheil, wrote recently? A. Yes, sir.

Q. Have you examined and read his third edition? A. I have read it all. Pardon, I said here a moment ago bacillus of erysipelas; I don't mean that I meant to say streptococcus of erysipelas.

Q. Now, I will ask you if there is not also a theory among prominent writers upon cancer to the effect that cancer is now being cured by methods without using the knife at all? Isn't that true? A. Yes, sir; they are.

Mr. Morrison: I think that is merely repetition.

Q. Now, I will ask you if there is not expressed by Mr. Gottheil, a recent writer upon this subject, the following theory——

Mr. Morrison: I object to anything Mr. Gottheil expresses.

Q. Well, strike out Mr. Gottheil. I will ask you if the following theory is not now advanced by prominent writers upon the subject——

Mr. Morrison: I object to what theories are advanced by prominent writers—regardless of who it is—as not being material, nor the best evidence.

Mr. Harkless: Well, I haven't got to ask my question, yet.

The Court: How do you figure out that these theories are material to this controversy?

Mr. Harkless: I will state to the court this: That this matter of a man's opinion about what he can cure is his business, and his license cannot be revoked because he expresses his own opinion upon that subject, because all are doing that; all the doctors are doing that. We may be wrong and they may be right. But I am trying to do this to show that these writers all over the country, prominent men, are advancing these theories, men of skill in the profession are advancing different theories which may be absurd to my mind, and perhaps to yours, such as giving a man snake disease to cure cancer; but it don't matter how absurd it is, they do that, and I want to establish the proposition that a variety of opinion exists, especially about cancer. That is the theory on which I am asking this question. The court may not agree with any of these people, but I think that this question of the opinion held by prominent physicians is competent and proper.

Mr. Morrison: I don't think it makes any difference whether one man or two men hold this opinion. It does not seem to me material whether Mr. Harkless bases his theory on the opinion of one man, or whether he says a prominent physician holds it—it is not whether

this man expresses an opinion, as Mr. Harkless puts it, and another man disagrees with it, but we are trying to show that he expresses an opinion and makes a statement of fact, and representations here that he knows are false. His own evidence shows that, or that he is wilfully ignorant.

The Court: I don't think it is material what this New York gentleman thinks about it.

Mr. Harkless: Well, I will withdraw the question about the New York gentleman.

Q. I will ask you if the prominent medical men in their profession, and known to be such, are advocating that there are better methods of curing the vast majority of cancers than the knife; and whether that is true or not?

Mr. Morrison: That is objected to as leading and suggestive and immaterial.

The Court: I think it is immaterial.

Q. I will ask you whether or not also many prominent physicians of the country do not agree and advocate that it is time that this weapon that is being used by the advertising parties and specialists, in regard to curing cancer, was taken out of their hands, and being put into the hands of regular practicing physicians?

Mr. Morrison: That is objected to as incompetent, irrelevant and immaterial and calling for hearsay testimony.

The Court: That is not an opinion on cancer; that is an opinion on ethics, I suppose, or means.

Mr. Morrison: We are not talking about ethics here, but we are talking about fraud.

Mr. Harkless: Oh, well, that is an easy thing to say; anybody can say that.

Cross Examination by Mr. Morrison.

Q. Mr. Purdue, hasn't your law practice interfered somewhat with your medical research? A. I don't think it has.

Q. Well, you have been practicing law, and securing evidence in cases and preparing cases for trial all this time that you have been conducting these extensive researches in the laboratories over across the line in Kansas City, Kansas, haven't you? A. I never did any work in Kansas City, Kansas.

Q. Your work has been entirely confined to this city, has it? A. To the laboratories in this city.

Q. And you are not a practicing physician? A. No.

Q. And make no professions in that respect? A. Never have practiced medicine at all, no, sir.

Q. And you don't make what they call clinical diagnosis? Is that a doctor's expression? A. Clinical diagnosis and pathological diagnosis; I just examine tumors—blood and cancers and tumors and such things.

Q. Well, you don't go out to examine patients and treat them? A. Oh, no; physicians send material to me for examination in the laboratory.

Q. For microscopical examination? A. Yes, sir.

Q. And then you send back a report? A. Yes, sir.

Q And you examine a great many other things besides cancer— A. Oh, yes; I analyze the city water every day, and have for four years.

Q. You say these people that have been here on the stand—that every one of them has given a classical description of cancer? A. As far as the clinical systems are concerned, yes, sir.

Q. Or do you mean as far as some of them have gone—they did not all of them give classical descriptions of cancer, did they? A. Well, the only thing they left out might have been things that were not asked them at all; everything they said was classical.

Q. Well, some of them did not say very much, did they? A. Not very much, no.

Q. But you think every one of those individuals gave a classical description of cancer, and you are willing to get up here now and say that each one of those people had cancer, just on what they said, without any microscopical examination? A. I said they were clinical descriptions of cancer; there were a few who did not give much of a description, but they had post operative recurrence, which is enough. That is just as good as a microscopic examination for the purpose of diagnosis.

Q. That is, that the cancer comes back? A. Yes, sir—the postoperative recurrence; that was just as good a description as a microscopical examination.

Q. Of course you are being paid by the day for your attendance here? A. I have not been.

Q. But you will be? A. I don't know that I will be.

Q. Have you any agreement about your pay at all? A. I have not.

Q. Not any at all? A. None at all.

Q. But you are going to give Dr. Johnson a bill for your services. You haven't been sitting here every day all during the time this trial has been going on for nothing? A. I suppose that you are being paid for your time, and I suppose I should be for mine.

Q. And you expect to be paid for your time? A. I may be; I have no reason to expect it except that I have been here. I have no reason to expect it from anything that has been said. I just come here to testify.

Q. You expect to give Dr. Johnson a bill? A. No, I don't.

Q. A good big bill? A. No; that will be with Dr. Johnson; I don't expect to render any bill.

Q. Besides the time you have been here in court you made out a long outline of things for Mr. Harkless to ask, didn't you? A. I made out an outline there of the malignant tumors, yes, sir.

Q. So that he could ask you all these questions? A. He asked me to make an outline of malignant tumors, and I made it.

Q. You did it? A. I did.

Q. You have been advising with him and telling him about things— A. Yes, sir.

Q. Just the same as if you were in the trial? A. Yes, sir, just the same as Dr. Hardin and two or three more have been advising you.

Q. You know I did not ask you anything about that, don't you? Are you still practicing law? A. Yes, sir.

Q. Where is your office? A. 1010 Scarritt Building.

Q. Are you there every day? A. Yes, sir.

Q. How much of the day—all day long? A. Not all the time. I have been down here for a week.

Q. What are your office hours? A. From about 9:30 until about five.

(Witness excused.)

MRS. LOUISA KIND, called as a witness on behalf of the defendant, having been duly sworn, testified as follows:

Direct Examination by Mr. Harkless.

Q. Where do you live? A. In Searles, North Dakota.

Q. What nationality are you, German, Swede or what? A. German.

Q. How old a lady are you? A. Pretty near fifty-two years—not quite.

Q. Mrs. Kind, were you suffering at one time from stomach trouble? A. Yes, sir.

Q. Were you afterwards treated by Dr. Johnson for it? A. Yes, sir.

Q. Before that had you been treated by other physicians? A. Yes, sir.

Q. What ones? A. Dr. Crane—the initials I don't know.

Q. Of where? A. Holstein.

Q. Dakota? A. No, at that time we lived in Holstein, Iowa.

Q. Holstein, Iowa? A. Yes, sir.

Q. How long did he treat you? A. Oh, I don't

know exactly, but it was along over a year or so. I suffered long mit (with) stomach trouble.

Q. What was the trouble? How did your stomach seem to hurt and affect you? What did that stomach trouble do with you? A. It hurt me awful bad just in the pits of the stomach; nobody darst to touch me, and even I couldn't bear my clothes, hardly.

Q. Now, did a lump finally come there, of some kind—a lump in your stomach?

Mr. Morrison: That's objected to as leading.

Q. Did something come in your stomach afterwards—if so, describe what it was. A. Then I got the hemorrhage, didn't I?

Q. Tell us what did it do to your stomach. What did it do—how did it act? Tell us all about it? A. Well, always it was sore, and I couldn't eat nothing—and heavy.

Q. A heavy feeling? A. Yes, sir, heavy feelings, yes.

Q. Now, how did it do with your weight? How much would you weigh? When you came to Dr. Johnson how much did you weigh? A. Well, maybe a hundred pounds; maybe not. I was just a skeleton.

Q. How long had you been suffering with this trouble at the time you came to Dr. Johnson—about how many years? A. Oh, the regular trouble, I guess it was more; it was hard a year and a half more.

Q. Now, did you have any hemorrhage or blood from that thing? A. Yes, sir.

Q. Now, describe that to us. A. Well, it was one

evening; I don't know that myself. I got kind of dizzy, and I come to—that is all what I know.

Q. Now, then, you say you went to bed? A. Yes, sir; just sitting on the bed, and that was all I know until after they found me.

Q. Now, how was that in the stomach, with reference to whether you could feel it hard in there or a lump? How did it feel? Do you understand what I say? A. Yes, sir, I understand; but I can't——

Q. (interrupting) You can't express it? A. No, I can't express it.

Q. Well, as to whether it was hard or soft? A. Well, yes, it was; that is what the doctor says. My doctor say it was hard here, and I don't know that, you see.

Q. Well, do you know whether or not—or were you afterwards treated by Dr. Johnson by mail? A. No, sir, not right away.

Q. Well, what next did you do? A. I got my home doctor and he gave me medicine and he cured me on that for cancer.

Q. He worked you on that? A. Yes, sir.

Q. How long? A. Oh, about three weeks.

Q. Then what did you do? A. I got weaker and weaker, and then I got another hemorrhage.

Q. Had a hemorrhage? A. Yes, sir.

Q. You mean did you vomit? A. Yes, sir.

Q. And what kind of stuff was it you would throw up? A. I don't know; I was unconscious.

Q. How did it look? A. I don't know.

Q. You were unconscious? A. Yes. You see so soon as I vomit then I became unconscious.

Q. Then what did you finally do? Did you commence treating with Dr. Johnson at some time by mail? A. Well, then, he went to the mine, and saw some other doctor.

Q. That is your husband? A. Ya.

Q. To see some other doctor? A. Yes, sir. We don't know, then, from Dr. Johnson—not right away.

Q. You hadn't known of him? A. No.

Q. Then, finally you learned of him? A. Yes; when mine husband come from the mine he had kind of a magazine, and he wrote to Dr. Johnson, but he didn't tell me nothing from it.

Q. Oh, your husband did not tell you he had? A. No.

Q. But he wrote to him, and did you get some medicine, then? A. Yes, sir.

Q. And you commenced taking it? A. Yes, sir.

Q. I wish you would tell the court, now, just what was the effect of it, and what it finally did. A. Well, he gave me some to put on my stomach to keep the inflammation down there, and I took the medicine three times a day.

Q. Internally in your mouth? A. Yes, sir.

Q. And what did it commence doing to you? A. Nicely feeling, and the food taste better to me.

Q. How long did you take it? A. Well, three or four days—well, I will say a week.

Q. Then you commenced feeling better? A. Then I feeling better.

Q. Then what became of the result of it? Did you finally get well? A. Yes, got slowly improved.

Q. How much do you weigh now? A. I don't know; but I guess about one hundred and sixty-five or seventy.

Q. Do your own housework? A. Yes, sir.

Q. How many children have you had? A. I had four at home at that time.

Q. Now, did this condition of your stomach finally go away? A. Yes, sir; finally did go away.

Q. Can you tell us, now, how it went away? A. No.

Q. Well, do you remember about anything passing from you like the appearance of coffee grounds? A. Yes, sir; that is tumors—what my husband says.

Mr. Morrison: I object to that.

Q. Were you unconscious then? A. He examined and he told it afterwards to me.

Mr. Morrison: I move to strike out that testimony.

Mr. Harkless: Certainly. I agree with you about that. I will have to prove that by him.

Q. Now, madam, what has been your condition since that treatment? How have you been? How are you now? A. Well, nicely; I got no pain—nothing.

Q. Been perfectly well, so far as you know? A. Yes, sir.

By the Court:

Q. How long ago was that that he treated you? A. About—it was before the last part of September.

Q. Of last year? A. No; it is now three years.

The Court: What was it the doctor gave her for that?

By Mr. Harkless:

Q. What was given you internally, do you know? What was the medicine? A. It was some medicine, and it does nicely, and I didn't have no pain, and everything; it gave me appetite, and all.

Q. Was it liquid—in a bottle? A. In a bottle; yes, medicine in a bottle.

Q. And how often did you take it? A. Three times a day.

By the Court:

Q. Was that all he did? A. Three times a day a teaspoonful.

Q. Was that all he gave you? A. Yes, sir.

Q. And how long did he give you that? A. Pretty near until Christmas.

Q. How many months? A. Three—a little one and then from two bigger ones.

Q. You were at home when you were taking this? A. Yes, sir.

Q. Did you come here to Kansas City at all? A. No, sir; all sent to me, and I took it at home.

Q. You wrote him about your condition? A. Yes, sir.

Mr. Harkless: Her husband did.

Q. You never saw the doctor? A. No, sir.

Q. What did he charge you? A. That I don't know, how much it was.

Q. What about your color before this? A. Oh, I guess kind o' such funny yellow color, and then my eyes always black around, and my skin was all deadly.

Q. Were you able to walk any at that time? A. No, sir.

Q. Couldn't even walk? A. No, sir, I could not.

Q. Were you confined to your bed? A. Yes, sir.

Q. For how long? A. Well, the 20th of October I was around the house and done the cooking—from September—I don't know which—September—but about the 1st of September until the 20th of October, and then I done my work. I was around the house and done the cooking.

Cross Examination by Mr. Bland.

Q. What year was that? A. Well, it is now two years ago in September.

Q. 1906? A. 1905—you have to ask him (indicating her husband). I don't know exactly.

Q. You don't know how long it was? A. How long it is since?

Q. Yes, what year was it? Was it two years ago in September? A. No, three years ago in September.

Q. You are positive of that? A. Yes, sir.

Q. And that it will be three years next September? A. Yes, sir.

Q. Now, then, Mrs. Kind, you know what an electric light is, don't you? A. Yes, sir.

Q. Did anyone ever place an electric light in your stomach? A. No, sir.

Q. Did anyone have to give you anything to eat and then pump it up out of your stomach? A. No, sir.

Q. Now, were you swollen very much at these times? A. No, sir.

Q. Were not swollen very much? A. No.

Q. And you don't know whether you bled any or not? I believe you said you were unconscious? A. Yes, sir; I don't know.

Q. How did it pain you? Describe the pain. A. Well, it was if anyone came near me that it took the breath away from me.

Q. If anyone touched you? A. Yes, sir; if anyone touched it, or just came near, I couldn't breathe then so good.

Q. It had no special pain, then, unless someone touched it? A. Yes, sir; pained all the time; but wasn't so bad as if somebody touch me; then I couldn't breathe.

Q. Have a dead pain all the time? A. Yes, sir.

Q. Didn't have any shooting pains? A. No.

Q. This pain did not go from left to right across the stomach? A. Yes, sir, the pain hurt from the pit of the stomach up to the right side.

Q. You mean the dead pain was from the pit of the stomach to the side? A. No, not when nobody touched me; it stood right here in the pit of the stomach. If somebody touch me it went up this way (indicating).

NOON RECESS.

Cross Examination of Mrs. Kind Continued by Mr. Bland.

Q. You stated this morning, I believe, that you never had been examined by any sort of light being inserted in your stomach, or no one had given you something to eat and pumped it out of your stomach? A. No, sir.

Q. Now, you say you sometimes were—that your skin was yellow and that you had fallen off some in weight? A. Yes—to a skeleton.

Q. And that you had a deadly pain in your stomach? A. Yes, sir.

Q. Now, did it hurt you when you ate—when you would eat? A. Yes, it did; and I would have to sit that way (illustrating), and just a little sip by sip.

Q. It pained you very much when you ate? A. Yes, sir; I had to sit always that way, merely to keep me alive.

Q. Now, what other symptoms did you have, now, that I have not told about just now—that an ordinary well person don't have? What other things did you notice about yourself besides those things—nothing further? A. No, sir.

Q. Now, when you wrote to Dr. Johnson did you write him these things? A. No, I don't know nothing about it. My husband done it. I don't know nothing about it until I got the medicine, and then he told me from where it was.

Q. You didn't do the writing yourself? A. No, sir.

Q. Now, this medicine he sent you, you say it had—did it have a sort of salty taste? A. No, sir; nice, sweet taste.

Q. Didn't taste like salt at all? A. No, sir.

Q. Or anything like salt? A. No, sir.

Q. Mrs. Kind, have you ever suffered from a boil or carbuncle? A. I don't know, sir.

Q. Or sores? A. No, sir.

Q. Do you remember of your father and grandmother? A. No, they never had anything because when I was very small I don't know nothing about them, but my mother is in good health yet, but she is very old.

Q. Do you know what eczema is? A. I don't know.

Q. Sort of a breaking out of the skin? A. Yes, sir; but I never had that.

Q. Now, how long did you take this medicine? When did you begin? A. From—it was the 10th of September, maybe, on until the 20th of October; I done the housework and done the cooking; got two children at home, and took care of them and myself.

Q. How long was it after you began to take this medicine that you were able to do your work? A. Well, I will say a week.

Q. A week after you began? A. A week after I took that medicine; I feel nicely right away, I should say, but I will say a week.

Q. How long had you been suffering from this before you wrote to Dr. Johnson? A. Well, I suffered longer than a year before, but as I was strong always, I didn't count it so, but from the 14th of May, that is when his mother died, then I came and fell gradually down.

Q. From the 14th of May until the following September? A. Yes, sir; then I fell gradually down so I grow weaker and weaker.

Q. From the time your husband's mother died? A. Yes, sir.

Q. Was that a shock to you, Mrs. Kind—her death? A. No, I suffered before plently enough, but I always had to work and keep on my feet. I worked just as long as I could. No, there was not a shock. That did not come unexpected. She was old.

Q. So you had suffered four months from this trouble before you wrote to Dr. Johnson? A. Yes, sir; really bad.

Q. Now, Mrs. Kind, did you ever pass this sore? Did it ever come out of you in any way? A. No.

Q. It did not?

Mr. Harkless: She don't understand you.

Q. Did the sore come out through your bowels? A. I don't know.

Q. You don't know? A. No, I don't know about that.

(Witness excused.)

OTTO H. KIND, called as a witness on behalf of the defendant, having been duly sworn, testified as follows:

Direct Examination by Mr. Harkless.

Q. Are you the husband of the lady who has just left the stand? A. Yes, sir.

Q. Where do you live now? A. I live now in Searles, North Dakota.

Q. How long have you lived there? A. Since the first day of August—

Q. (interrupting) Now, I wish you would just describe this to us now—this case of your wife—from beginning to end as quickly as you can. A. Well, Your

Honor, I just want to explain certain things. It may look to you a mystery, or look to you my wife in her testimony don't—

By the Court:

Q. Just tell us about it. A. (continuing) don't tell the thing as I will give it, because she was a long time unconscious, that she don't know what had passed her, and she couldn't give you the details as I can give them.

By Mr. Harkless:

Q. Well, go ahead and tell us. A. Now, my wife had suffered mit a pain in her stomach here, we call it in German ..... burning—heart burning they call it too. While it didn't bring her down to bed, she suffered more or less with it, and all the doctors told me—

Mr. Morrison: I object to that.

Q. Well, what did you do? A. Well, I seen a doctor for it, and he told me—

Mr. Bland: That's objected to.

Q. Never mind what he told you.

The Court: Oh, let him go on and tell it, and I can strike it out if it is not proper.

A. (continuing) He told me that she suffered with gall stones; and after a while we had doctored and gave her medicine and we had no relief from it, and I told him one day, "Doctor, I want the truth from you—what is the matter with my wife? What is she suffering with?" And he says, "Kind, I will tell you, it is cancer of the stomach." And he says, "I believe that the liver is affected too, and I don't know what we can

do for you." So I sent away to a doctor by the name of Farnsworth, and I got him there and told him to examine me my wife, and he gave the same diagnosis, that my wife suffered with cancer of the stomach. Not satisfied with that, I sent to another doctor who lived at Ida Grove (?), Dr. Heuermann (?), and I told him, "Here, you take and examine my wife." By then my wife has been suffering so already that she was down in bed and had had one of them bleeding spells; coughed a whole lot of blood up—hemorrhage of the stomach, he called it; and we didn't measure it, neither have I taken any dates down when it happened, because I never thought I would have to testify in court; so it is not in my memory so I can tell exactly the date. And he told me also it was cancer of the stomach, and there was nothing to do with it. Then I was recommended to a doctor by the name of Smalls in Des Moines, and I went up there and consulted that doctor and had a consultation, and took from my home doctor medicine along, and told him all about the case—

Mr. Bland: I object to that.

The Court: Let him go ahead.

Plaintiff excepted.

A. (continuing) "I am afraid," he says, "you got a good doctor, but we can't do nothing for your wife because she is so far gone by the description that you give, that we can't cure her any more." When I got home from Des Moines I saw in the paper Dr. Johnson advertising to cure cancer of the stomach and I sent Dr. Johnson two dollars to send

me a trial order of his medicine; and I gave her that medicine, and took the medicine my doctor gave me away, and only gave her that medicine what Dr. Johnson had sent me; but I admit I was wrong; I did not tell my doctor that I used that medicine; and I took his medicine every time, the part what we should give to my wife, I took that out, and throwed it away; but I gave Dr. Johnson's medicine. And after two or three weeks of Dr. Johnson's medicine my wife had a spell of sneezing, and her bowels moved and something passed with the stool, and my wife lay unconscious, and I had to get the doctor, and the doctor says, "Kind, there is a full grown cancer." And it looked like ground coffee, and there was tissue in it, and you could cut and tear it to pieces, and he took it, and I don't know if he sent it to the medical college. And I kept giving my wife Dr. Johnson's medicine. I wrote him to send me a full course of that medicine, which cost me twenty-seven dollars, and I got a full course, and before she had taken all of the medicine she was out of bed; and there she is today healthy and strong.

By Mr. Harkless (continuing):

Q. About this coffee grounds, you speak of. Do you say it looked like coffee grounds? A. Yes, sir, and looked like a lot of dry blood, as if you have blood dried long ago, and it was kind o' brownish color, with kind o' lighter tissue that held it in the form like an egg form—she had it on the stomach.

Q. You have seen coffee grounds? A. Yes, sir.

Q. How did it compare with them? A. Pretty

near like it. I couldn't describe anything nearer to it than that.

Q. That is as near as you can describe it? A. Yes, sir—like grounded coffee.

Q. How thin did she get to be? A. Well, she was so thin that I could take her like a baby on both hands and carry her from one bed to another, and one room to another.

Q. How much did she weigh, about? A. Why, I don't think she weighed over ninety pounds, if she weighed that much.

Q. How much does she weigh now? A. ,I guess she weighs about a hundred and ninety.

Q. What was her complexion during this time? A. Yellow.

Q. And how was her skin? How did that seem to be? A. Well, seemed to be wrinkled together.

Q. And how about pains in the stomach? A. Well, she has complained, and the way she has described that—because I didn't have it, but from her description it was that she had kind of a sensation of pressing pain, and then a burning sensation; and, as I say, we doctored for it.

Q. And what about a lump in her stomach? Was there any lump there? A. Yes, sir.

Mr. Bland: I object to that as leading and suggestive.

Q. Well, state whether or not there was any lump in the stomach? A. Yes, sir; there was one.

Mr. Bland: I move that that answer be stricken out.

Motion overruled; plaintiff excepted.

Q. Now, what about shooting pains around the sides—whether she complained of those or not? A. Well, yes, she had pains sometimes in the side, but I don't know that I could say that I paid any more attention to it only towards the last when she was sick in bed.

Q. Now, there is some little indefiniteness about when this was. Can you tell how long ago it was that she was treated? A. Well, we ain't got the date, but it will be the next fall, now, three years; so it must have been 1905.

Q. What time? A. Well, from the spring, after my mother died she became so that she had to go to bed. Before that she was up and has done the housework; but then she had to go to bed until—

Q. (interrupting) Had she been in bed all the summer before? A. Pretty near all the summer; sometimes she been up more or less—half an hour or two hours at a time; and then she had to go to bed again. And at last she became so she had to lie steady in bed. I think it was about twelve weeks that she never got out of bed; of course, I can't give it exactly; I didn't take no date down.

Cross Examination by Mr. Bland.

Q. Now, then, Mr. Kind, when did you notice this? You say blood came out of her mouth? A. Yes, sir.

Q. When did you notice this—before you wrote to Dr. Johnson or after? A. Yes, sir; before I wrote to Dr. Johnson.

Q. Now, how long did she take this medicine given you by the doctor there in your town? A. Well, as near as I could *prescribe* it, about ten weeks—that is, the last what we got from Dr. Johnson.

Q. And you (she) took that medicine ten weeks? A. Yes, sir.

Q. Do you know what that medicine was for? A. For curing cancer of the stomach.

Q. That the doctor gave her up there? A. Yes, sir. No, I mean what Dr. Johnson sent to me.

Q. I am not talking about Dr. Johnson, now, but that doctor up there. A. Yes, sir; he gave us medicine for curing the cancer, but it didn't do it.

Q. How long did he give her medicine? A. Well, he gave her medicine the whole spring before she ever came to bed; gave her medicine, but always said he gave her medicine for gall stones.

Q. How long did he treat her for gall stones? A. Well, all in all, he treated her thirteen months.

Q. Did you hear your wife say here awhile ago that the first time she noticed the trouble was about the time your mother died? A. No.

Q. And that it lasted four months? A. No; she had that longer.

Q. Did you hear her say that, Mr. Kind? A. Well, I heard her say that,—well, I told you we didn't take no dates down.

Mr. Harkless: She did not say that.

Mr. Bland: That don't make any difference, I say she did say it.

Mr. Harkless: She said she took worse again.

Mr. Bland: I suppose that is what she said.

Mr. Harkless: You are altogether mistaken. You ought not to ask in that way.

Q. Did you hear her say that? A. Not exactly like you gave it, at the time.

Q Didn't you just now say that you did hear her say it? A. What is it? What is your question?

Q. Now, you said something about tissues a while ago. Whom have you been talking to about tissues? A. Well, now, tissues, I understand, is the thing that holds some other things together.

Q. Who told you about tissues? A. Well, the first that I heard it was them doctors of ours. He said it is kind of a tissue holding that together. I don't know—I didn't study enough to know——

Q. (interrupting) Did any of these men here tell you anything about tissues? A. I didn't speak to these men about anything about that kind.

Q. Never have spoken to them? A. No, I just came this morning on the train, and here I am.

Q. Did you talk to them before you went on the stand? A. Well, they asked me a few questions.

Q. I am not asking you how much you said, but if you talked to them about the case? A. Well, not exactly about the case.

Q. What was it about? A. Well, the first comes that question, generally the rule, when you see a man coming from far away, to ask him how he is getting along, and what are you doing, and then later on they

alluded to the case that I was called here for a witness to come and testify to what I know about it, and I had my mind made up that I tell the truth——

Q. (interrupting) Whom did you talk to? A. Well, here in the room, before we got in here——

Q. (interrupting) I asked you if you knew who it was.

The Court: It is hardly necessary to bring out a matter of that kind, in trying a case to this court.

Mr. Harkless: It is conceded that he talked with us about it.

Mr. Bland: Yes, and you told him about tissues, and a lot of scientific terms here.

A. (continuing) Well, if you ever heard anything, keep it. I did not.

Q. Alright. Now, when did you leave to come down here? A. Monday morning at six o'clock.

Q. From Searles, North Dakota? A. Yes, sir.

Q. I suppose your expenses are being paid here? A. That is what I expect.

Q. Now, then, who wrote you about coming? A. Dr. Johnson, I think it was.

Q. What did he say in that letter? A. I think that is my business.

By Mr. Harkless:

Q. Have you got the letter here with you? A. Yes, sir.

Mr. Harkless: Let him see it.

The Court: I don't care about it.

The witness: You can read the letter. It is open here. The gentleman can read it himself.

Mr. Bland: The judge says he don't care anything about it.

The Witness: Well, you read it, and read it so that every body can read it, please.

By Mr. Harkless:

Q. How much money did you spend with these other physicians before you came down to this?

Mr. Bland: That is objected to as incompetent, irrelevant and immaterial.

A. About thirteen hundred and seventy-five dollars.

The Court: The objection is sustained.

Q. He says here he will compensate you for your time. A. Well, aint that right? I expected that.

Q. Just wait a moment; don't volunteer too much information here. What is your time worth? A. Well, it is worth five dollars a day because I am a man in business.

Q. What is your business? A. Tailor.

Q. Now, then you wrote one letter to Dr. Johnson asking him for his medicines, did you? A. Yes, sir.

Q. And in that letter you told Dr. Johnson about your wife's color and pain? A. Yes, sir.

Q. That she had? A. Yes, sir.

Q. And what else did you tell him? A. That he should send me some of his cancer cure at once.

Q. Is that all you said in it? A. Well, that is all I know of.

Q. Did you tell him about the other physicians,—what they said about it? A. Well, I told him that the

other physicians had pronounced it cancer of the stomach, and I certainly had to *prescribe* that to him, what condition it was. Any common sense would do that; I had to prescribe it.

Q. And these physicians had told you what it was and what they pronounced it? A. Yes, sir.

Q. And did you tell him how long they said she would live? A. Yes.

Q. How long? A. Well, the doctor in Des Moines said it was three weeks he give her, and it was unnecessary for me to spend any more money.

By Mr. Bland:

Q. Did you write Dr. Johnson that? A. No, I don't think I wrote that to him. I explained that afterwards to him, though, after she was cured.

Q. Well, now, what else did you write? Have you said everything that you wrote him? A. Yes.

By Mr. Harkless:

Q. When did you first see Dr. Johnson? A. This morning.

Q. Never have seen him before? A. No, sir.

Q. Well, did your wife ever see him until this morning? A. No, sir.

Witness excused.

At the conclusion of the hearing of this case on the 20th day of May, 1908, proceedings were had as follows:

Mr. Harkless: That is all, Your Honor.

Mr. Bland: That is all we have.

The Court: The only question in my mind is about the advertising. No one can hear this testimony and not

feel convinced that this physician, and men of his class engaged in the same specialty, are curing some desperate cases of disease of some kind or other, whether it be cancer, or whatever it may be. Take this last woman on the stand here,—she was a sick woman. No doubt about that in view of this testimony. There have been dozens of witnesses here that have shown scars showing they had something, and have been apparently cured; and whether these men cure cancer or cure something else they are certainly giving relief to a large group of people,—people who are evidently satisfied themselves that they have had relief and been cured. Now, I believe it would be a public calamity to deprive afflicted people of help from whatever source it may come or be available. The only question in my mind now is, conceding that this is all true, whether this physician has been deliberately misleading people and getting money out of them when they were in an incurable condition, promising to cure them when he knew, or ought to know that he could not give relief. That is the only question in my mind. I think this advertisement is pretty strong: I think it is too strong. I do not think it should be sent out in that form, although Dr. Hardin when I ask him what the forms of cancer are he tells me they are the forms, just as these other men say there are certain forms and all curable. Dr. Hardin agrees with that view; and so, scientifically, there is nothing misleading in that advertisement. It is only a question as to whether it misleads the laity.

Mr. Harkless: And has he deceived anybody?

The Court: And nobody has been here to say he has been deceived.

Mr. Bland: We do not claim they were deceived, but simply that he is sending out this literature.

The Court: What is the issue you want the court then to pass on?

Mr. Bland: As to whether the advertisement is misleading in itself.

The Court: That would be one evidence that it is misleading, to have people come here and say they had been misled. Nobody has been here complaining of it, and a great many people have been here speaking in very favorable terms of the treatment they have received, and expressing great satisfaction.

Mr. Bland: I don't know that it would do any good to mention them, but we have a lot of names of people who were not cured; but we did not think we were trying this man for deceiving any particular person, and did not want the court to take that view of it.

The Court: I understand, and this record shows, that Dr. Johnson has not accepted all cases. What per cent of the cases have you turned away, Dr. Johnson, and refused to treat?

Dr. Johnson: Between twenty and twenty-five per cent.

Mr. Bland: Of course that book there,—he would not be allowed to contradict anything in the book by what he actually does.

The Court: No; but that is evidence of whether he is trying to get money out of people by false represen-

tations. If it appeared here that he did take money from people manifestly incurable, and made a business of it, and deceived them, that would be evidence of his intention; if on the other hand he has showed that he did not take their money when he felt they were incurable, it would be the other way. Moreover, I do not know that there would be anything wrong in giving aid to an incurable case. All physicians do that. Of course they do not promise cure, but even if it is merely temporary and palliative it is a good thing to do.

Mr. Bland: There are a lot of other things in the case besides that; this mail order proposition—

The Court: Well, here are people here that apparently have been cured by that method.

Mr. Bland: There has never been any diagnosis of the case.

The Court: I don't know that that makes much difference. I am looking at it from the standpoint of the public, now. What difference does it make whether this crowd of people had cancer or not? They had something, and something very serious, that their doctors did not cure, and they have been cured, so they say, and are perfectly satisfied, and, in fact, enthusiastic over it. Now, ought this court to deprive people in that condition of the opportunity of getting relief, whether it is cancer, or whether it is a tumor or an ulcer?

Mr. Bland: Of course there is no testimony here that any doctor could not do just the same thing; but any doctor is not at liberty——

The Court: Yes, but evidently others are not doing

it because they are complaining of it. Here is a man who has been on the stand, who at the age of eleven years, had a very malignant growth on his face, and one of the leading surgeons of this city put him on the operating table three hours and cut it out, and afterwards he was treated by some distinguished specialist, and here after a good many years this man comes on the stand and says he has been cured. I cannot exclude that. There is the photograph of his condition when he was a boy, and here he is cured. If I had a child in that condition, in view of this testimony, I would like to have him treated, and I would not like to make a man an outlaw that cured such a thing, unless he was a scamp on top of it. I think that advertisement is too strong. I do not think it ought to be used.

Mr. Bland: Another feature,—he says he gives his personal attention to these matters. Now, he admits in cross-examination that he has got other men to take care of them.

The Court: Yes, and Dr. Blair and Dr. Griffith keep their assistants. They all do that.

Mr. Bland: But one of those doctors does not tell a man away off a hundred miles that he gives his personal attention to the thing.

The Court: I don't know what he does. If I could be assured that this advertisement would be modified so that there could not be any question about it, I would feel disposed, without any question, to set aside this order of the Board of Health, or whatever the proper procedure is. I want to see the statute on that.

Mr. Harkless: Will you permit me to make a suggestion. I think, something like the court, that frequently a man who has been so successful as this man has been, overstates things which, to him, might be true, but which to you or to the public might be overstated. That is true; and the court thinks that is true, and I have talked to him about it, and he says that if he had it to do over again perhaps he would not put it in so strong statements, although he still believes them to be true.

The Court: Now, here, looking at it from one standpoinnt, from the standpoint of the scientific man, there is no misrepresentation; but here is the other way to look at it,—whether that is going to mislead a sufferer grasping at straws,—and he says. "Why, here this man says he can cure cancer in all forms. I have cancer of the stomach; that is one form, and he promises me to relieve it." That is another way to look at it and at first blush that is the way I would look at it and did look at it, and that kind of a statement ought to be modified to make it perfectly fair so that the wayfaring man would not be misled. What assurance can you give me that that sort of an advertisement will not be continued?

Mr. Harkless: If you will take mine, I think I am authorized to say for Dr. Johnson just this, that he has said to me, and I will state to the court what he said. He said to me that in the view of the layman, as he now sees it,—that they might misunderstand what "forms of cancer" meant. Now, he says he understands that as a physician understands it, but he says now that it would be well to have left it out, and he wishes he

had, and he would do it hereafter. And I say to the court now, and can say, that he will do so. He has not deceived anybody.

The Court: Suppose the court believes him guilty of a mistake. I do not feel like tying a man's hands that can do good and give relief to suffering humanity. I do not think I would be rendering any public service in depriving him of the opportunity to give relief.

Mr. Bland: If Your Honor please (inaudible).

The Court: (Inaudible) and nearly every man that has died has died in the care of a physician. We ought not to curtail and hedge in the field of opportunity.

Mr. Bland: We do not deny that he can do anything that another doctor can do, or that any doctor can do what he can do; but here is a man starts out with a grossly exaggerated advertisement and admits he is——

Mr. Harkless: We are not admitting anything. Do not misunderstand me.

Mr. Bland: If you take the pamphlet and read it over, Your Honor,——

The court: I have read it over.

Mr. Bland: We could not revoke any man's license on an advertisement if we cannot do it on that.

The Court: The trouble is that they have brought the witnesses here to prove pretty nearly everything he said he could do. I cannot close my eyes to this testimony; I don't see how anybody can.

Mr. Bland: (Inaudible).

The Court: Well, I do not care what it is; I am going to let him go ahead and cure some more of the

same things, whatever they are, just so he don't mislead people. You can go ahead, Mr. Harkless, and prepare the necessary entry.

And on the 22nd day of May, 1908, the court rendered judgment and decree herein in favor of defendant, in words and figures following:

THE BOARD OF HEALTH OF THE STATE OF MISSOURI,

vs.

O. A. JOHNSON.

Now on this day this cause coming on for trial before the court, both parties having in open court waived a jury and agreed to submit this cause to the court, the court finds that heretofore, to-wit, on the 30th day of July, 1907, the Board of Health of the State of Missouri, took up for hearing and heard charges pending against the defendant O. A. Johnson so preferred against him before said Board, and that on the 31st day of July, 1907, the said Board after hearing the evidence entered an order and judgment that the license and certificate of said defendant O. A. Johnson to practice medicines in all its branches in this state should be revoked and the said O. A. Johnson be thereafter prohibited from practicing his profession of medicine.

Thereafter in due time an appeal was taken by said defendant to this court and now upon the trial of this cause before the court the parties appear by their respective counsel and each party introduces testimony and finally submits the cause to the court for its judgment.

Thereupon it is adjudged, ordered and decreed by the court that the charges preferred against said O. A. Johnson before the said State Board of Health and renewed in this court have not been sustained by the evidence and that the license and certificate of said defendant O. A. Johnson to practice medicine in all its branches in this state should not be revoked, cancelled or set aside, but that he should be permitted to continue to practice medicine in this state and that his license and certificate so to do should continue in full force and effect.

And it is further now ordered, and adjudged that the order of the Board of Health of the State of Missouri, heretofore made in this cause on the 31st day of July, 1907, revoking the license and certificate of the said O. A. Johnson to practice medicine in all its branches in this state should be and it is here now by the court set aside and for naught held and esteemed and that said O. A. Johnson be and he is hereby restored to any and all rights that he had before enjoyed under his license and certificate to practice medicine as if said proceedings had never been instituted or said order of the Board of Health of the State of Missouri had never been made.

And it is further ordered that the plaintiffs be and they are hereby adjudged to pay all costs incurred in this cause and that the defendant have and recover from the plaintiffs any and all costs that he has laid out and expended on account of the defense of said cause.

And it is further ordered that the defendant go hence without day.

State of Missouri, County of Jackson, ss:

I, Fred P. Barnett, Official Stenographer to Division No. 4 of the Circuit Court of Jackson County, Missouri, at Kansas City, do hereby certify that the foregoing one hundred and forty-five (145) pages so numbered are a true and correct transcript of the testimony of the several witnesses named and of the opinion of the court and of the record entry of judgment therein set forth in the case of the *Board of Health of the State of Missouri* v. *O. A. Johnson, No.* 34699.

In witness whereof I have hereunto set my hand this 18th day of March, 1909.

FRED P. BARNETT,
Official Stenographer,
Division Four, Circuit Court.

UNITED STATES *v.* JOHNSON.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

No. 433. Argued April 13, 1911.—Decided May 29, 1911.

The term "misbranded" and the phrase defining what amounts to misbranding in § 8 of the Food and Drugs Act of June 30, 1906, 34 Stat. 768, c. 3915, are aimed at false statements as to identity of the article, possibly including strength, quality and purity, dealt with in § 7 of the act, and not at statements as to curative effect; and so *held* that a statement on the labels of bottles of medicine that the contents are effective as a cure for cancer, even if misleading, is not covered by the statute.

177 Fed. Rep. 313, affirmed.

THE facts are stated in the opinion.

The Solicitor General, with whom *Mr. Assistant Attorney General Denison*, *Mr. George P. McCabe* and *Mr. Loring C. Christie*, Special Assistants to the Attorney General, were on the brief, for the United States:

The acts charged in the indictment fall within the letter of the statute, and the matters charged are not to be carved out of the statute as being not within its purposes. They are both injurious to health and frauds on the public.

Even if the public health had been the sole concern of the statute the matters charged in the indictment would have fallen within its intendment.

Cheats and frauds were, however, among the principal mischiefs denounced by the act. See committee reports, congressional debates, and the other acts *in pari materia*.

Reference is made to debates in order to show what the evil was which the legislature intended to remedy. *Jennison* v. *Kirk*, 98 U. S. 459; *Holy Trinity Church* v. *United States*, 143 U. S. 465; *American Net. &c. Co.* v. *Worthington*, 141 U. S. 473; *Binns* v. *United States*, 194 U. S. 486, 495, 496; *Blake* v. *National Banks*, 23 Wall. 307, 319; and see 59 Cong., 1st sess., H. Rept. No. 2118, to accompany S. 88; 58 Cong., 2d sess., Sen. Rept. No. 1209, to accompany H. R. 6295; Sen. Bill, 198, 58th Cong., 2d sess.; 57 Cong., 1st sess., S. Rept. No. 972, to accompany S. 3342.

Other statutes *in pari materia* indicate the same policy to deal not only with health but with frauds. See Act of July 1, 1902, 32 Stat. 632; Rev. Stat., § 2934; Act of March 3, 1905, 33 Stat. 87.

The legislative history of the enactment affirmatively shows that this very evil was considered and discussed and intended to be covered.

As soon as it was proposed to extend the definition of the word "drug" so as to include patent medicines, opposition arose on this very ground, that misrepresentations of curative properties would be covered. The discussion affirmatively showed that this was intended, and the

opposition failed. House bill No. 6295, § 5, 58th Cong., 2d sess., p. 34; bill No. 3342, 57th Cong., 1st sess; Sen. Rep. No. 972, 58th Cong., 2d sess., Sen. Rep. No. 1209, pp. 4–68; 58th Cong., 2d sess.; Id. pp. 97–100.

The amendment to the bill changing the definition of misbranding so as to cover not merely "any statement regarding the ingredients or substances contained in the article," but statements regarding the article itself, was made as a result of doubt whether this sort of thing would otherwise be covered. A substitute bill which was urged as preferable because it excluded misstatements of curative properties was rejected.

The practice of patent-medicine concerns to make extravagant "cure-all claims" was one of the principal evils denounced in the public agitation contemporaneous with the progress of the bill. The facts of this agitation being part of the history of the times can be examined as indicating the nature of the evils attacked. *United States* v. *Pac. R. R. Co.*, 91 U. S. 72, 79; *Church of the Holy Trinity* v. *United States, supra*, p. 464; *Smith* v. *Townsend*, 148 U. S. 490; *Aldridge* v. *Williams*, 3 How. 1, 24; *United States* v. *Freight Assn.*, 166 U. S. 290; *McKee* v. *United States*, 164 U. S. 287, 292; *Mobile R. R.* v. *Tennessee*, 153 U. S. 486, 502; *Preston* v. *Browden*, 1 Wheat. 115, 121; *Ex parte Milligan*, 4 Wall. 2, 114; *Hamilton* v. *Rathbone*, 175 U. S. 419; *Pac. Coast S. S. Co.* v. *United States*, 33 Ct. Cl. 36, 56.

From the first enforcement of the act the officers charged by it with the duty to put it in operation have construed and applied it to include fraudulent labels of the character here involved, and this construction was uniformly acquiesced in except that the present defendant has contested it. *United States* v. *Moore*, 95 U. S. 760, 763; *Heath* v. *Wallace*, 138 U. S. 573, 582; *Hastings Co.* v. *Whitney*, 132 U. S. 357, 366; *Five Per Cent Cases*, 110 U. S. 471; *Edwards* v. *Darby*, 12 Wheat. 206; *Brown* v. *United States*,

113 U. S. 568; *Union Insurance Co.* v. *Hoge*, 21 How. 35; *Smyth* v. *Fiske*, 23 Wall. 374.

See also Notices of Judgment, published by the Department of Agriculture, Nos. 16, 25, 29, 54; see also *United States* v. *Munyon's Remedy Co.*, U. S. Dist. Ct., E. D. Pennsylvania, Dec. 14, 1910.

The similar provisions of various state statutes have been construed by the administrative officers as covering false statements as to curative properties.

Practically the general definition of misbranding would have no application to the second class of drugs unless it applies to the sort of thing here involved.

The cure-all evil is the one great misbranding evil of the patent-medicine trade. In using the unlimited language which it did use Congress cannot have intended not to exclude this evil, thereby practically leaving the misbranding provisions without application to this great branch of the subject of the act.

Nor are these affirmative indications of the intent of Congress to be overruled on the theory advanced in the argument below that such statements of curative properties of patent medicines are matters of scientific opinion and that Congress has no power to control them.

As the bill passed the Senate it contained the word "knowingly." Cong. Rec., vol. 40, pt. 1, p. 897. But that word was eliminated by the House amendment (H. R. Rep. 2118, 59th Cong., 1st sess.), and without the word the bill became a law.

Our jurisprudence does not place matters beyond legal control merely because their correct solution may depend upon opinion. See *Buttfield* v. *Stranahan*, 192 U. S. 470; Act of July 1, 1902, c. 1378, 32 Stat. L. 728, and see also annual appropriation acts for the Department of Agriculture, June 30, 1906, 34 Stat. 674; Mar. 4, 1907, 34 Stat. 1260; May 23, 1908, 35 Stat. 254; Mar. 4, 1909, 35 Stat. 1043; May 26, 1910, 36 Stat. 419; August 30, 1890 (ch.

839, 26 Stat. 414); *Crossman* v. *Lurman*, 192 U. S. 189; acts of August 3, 1888, c. 376, 22 Stat. 214; March 3, 1891, c. 551, 26 Stat. 1084; and see *State* v. *Board of Examiners*, 32 Minnesota, 324; *People* v. *McCoy*, 125 Illinois, 289; *Dent* v. *West Virginia*, 129 U. S. 114.

The law of malpractice holds a physician to that degree of skill and learning which is possessed by the average member of his profession. *Pike* v. *Housinger*, 155 N. Y. 201; *Logan* v. *Field*, 75 Mo. App. 594; *Jackson* v. *Burnham*, 20 Colorado, 532; *Patten* v. *Wiggin*, 51 Maine, 594; *Nelson* v. *Harrington*, 72 Wisconsin, 591.

The laws for the determination of insanity and the segregation of the insane, and in general all health and quarantine laws, stand entirely upon matters of scientific opinion. *Edgington* v. *Fitzmaurice*, 29 L. R. Ch. Div. 459.

Even in this class of cases matters which may theoretically be matters of opinion or state of mind are not exempt from the notice of the law. *Durland* v. *United States*, 161 U. S. 306; *Butler* v. *Watkins*, 13 Wall. 456; *Mo. Drug Co.* v. *Wyman*, 129 Fed. Rep. 623; *Rogers* v. *Va. Car. Chem. Co.*, 149 Fed. Rep. 1, 78 C. C. A. 615; *Ten Mile Coal & Coke Co.* v. *Burt*, 170 Fed. Rep. 332; *Kohler Mfg. Co.* v. *Beeshore*, 59 Fed. Rep. 572; *Fenwick* v. *Grimes*, 8 Fed. Cases, 4734, 5 Cranch C. C. 603; *Hedin* v. *Minn. Medical Institute*, 62 Minnesota, 146; *Olston* v. *Oreg. Water Power Co.* (Ore.), 96 Pac. Rep. 1095; *Walters* v. *Rock* (N. Dak.), 115 N. W. Rep. 511; *McDonald* v. *Smith*, 139 Michigan, 211; *Nowlin* v. *Snow*, 40 Michigan, 699; *Totten* v. *Burhans*, 91 Michigan, 495; *Stoney Creek Woolen Co.* v. *Smalley*, 111 Michigan, 321; *Johnson* v. *Monell* (N. Y.), 2 Keyes, 655; *Stewart* v. *Emerson*, 52 N. H. 301; *Bugham* v. *Bank*, 159 Pa. 94; *Ayres* v. *French*, 41 Connecticut, 142; *Down* v. *Tucker*, 41 Connecticut, 197; *Laing* v. *McKee*, 13 Michigan, 124; *Sweet* v. *Kimball*, 166 Massachusetts, 333; *Adams* v. *Gillig*, 139 App. Div. (N. Y.) 494; *Smith* v. *Smith* (Ala.), 45 So. Rep. 168; *Brady* v. *Elliott*, 146 N. Car. 578; *Carr* v.

Craig (Iowa), 116 N. W. Rep. 720; *City Deposit Bank* v. *Green* (Iowa), 115 N. W. Rep. 893; *Wolfe* v. *Burke*, 56 N. Y. 115, 122; *Edgington* v. *Fitzmaurice*, 29 L. R. Ch. Div. 459, *supra*. *Am. School of Healing* v. *McAnnulty*, 187 U. S. 94, distinguished.

From the point of view necessary to be taken by a legislature, these statements of cure-all properties of patent medicines are not in any real scientific sense matters of opinion. They are charlatanic and their falseness is generally demonstrable without real dispute. See the code of the American Medical Association, 1883, Art. 1, § 3.

The constitutional power of Congress to prohibit use of the instruments of interstate commerce to the injury of the public is no longer open to question. *Reid* v. *Colorado*, 187 U. S. 137, 146; *The Lottery Case*, 188 U. S. 321; *Buttfield* v. *Stranahan*, 192 U. S. 470, 492–493; *Crossman* v. *Lurman*, 192 U. S. 189, 199, 200; *St. L. & I. M. Ry.* v. *Taylor*, 210 U. S. 281, 287.

And see the following cases upholding the constitutionality of this act. *United States* v. *Seventy-four Cases of Grape Juice*, 181 Fed. Rep. 629; *Shawnee Milling Co.* v. *Temple*, 179 Fed. Rep. 517.

This power does not exist in the States because delegated to the Federal authority. *Bowman* v. *Railway Co.*, 125 U. S. 465; *Leisy* v. *Hardin*, 135 U. S. 100, 108. See *Re Rahrer*, 140 U. S. 545.

The statute is remedial, and should not be narrowly construed. In this respect it is like the Interstate Commerce Act—a remedial statute with penal incidental features. *N. H. R. R.* v. *Int. Com. Comm.*, 200 U. S. 361, 391; *Taylor* v. *United States*, 3 How. 191.

Mr. James H. Harkless, with whom *Mr. Charles S. Crysler* and *Mr. Clifford Histed* were on the brief, for defendant in error:

The purpose of the statute is to secure pure food and drugs.

As related to drugs the term "misbranded" used in § 8 is confined to representations concerning the identity of the drug, its physical constituents, or chemical ingredients. It does not refer to claims for curative properties of such drugs.

A claim that certain beneficial results will follow the use of a prescribed drug or medicine obviously is not a statement of an existing fact, but is a forecast concerning a future event and is in the nature of things an expression of an opinion.

The court will take judicial notice that there are many different schools of medicine whose methods of treatment, and whose opinions concerning the curative properties of drugs and medicines, radically differ—some refusing to ascribe any medicinal virtue to any drug under any circumstances. No method has yet been devised by finite man to harmonize these warring factions, and indeed, it cannot be said that the truth lies entirely with any one of them. Congress cannot under the circumstances be deemed to have intended by this legislation to invade a field so speculative and conjectural—certainly not in the absence of apt language clearly and irresistibly evincing such a purpose.

The drug is the subject-matter of the commerce. The brand or label which it bears is but an incident to the commodity itself and forms a part of the commerce in the article only in so far as it deals with the identity of the commodity contained in the package. But a statement which gives no information concerning the commodity itself, its physical constituents, or its chemical ingredients is not so related to the commodity as to form a part of the commerce in the article and is not, therefore, a part and parcel of the commerce within the regulating power contemplated by this statute.

This is a criminal statute creating and denouncing a new offense. All matters of doubtful interpretation are

to be resolved in favor of the defendant and he should not be subjected to its pains and penalties except upon clear and undoubted warrant from the plain and inevitable language of the statute.

The construction sought by the Government that this statute extends to claims concerning the curative properties of medicines or drugs would render the statute void as being beyond the power of Congress to enact.

By not giving to the statute an extreme and strained construction, grave and doubtful constitutional questions are avoided, and at the same time it is susceptible to such reasonable interpretation as to make it a vital and effective instrument in curing the manifest evils which prompted its enactment. Under such circumstances, therefore, there is no occasion for resorting to such doubtful and forced interpretation.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an indictment for delivering for shipment from Missouri to Washington, D. C., packages and bottles of medicine bearing labels that stated or implied that the contents were effective in curing cancer, the defendant well knowing that such representations were false. On motion of the defendant the District Judge quashed the indictment (177 Fed. Rep. 313), and the United States brought this writ of error under the Act of March 2, 1907, c. 2564, 34 Stat. 1246.

The question is whether the articles were misbranded within the meaning of § 2 of the Food and Drugs Act of June 30, 1906, c. 3915, 34 Stat. 768, making the delivery of misbranded drugs for shipment to any other State or Territory or the District of Columbia a punishable offense. By § 6 the term drug includes any substance or mixture intended to be used for the cure, mitigation or prevention of disease. By § 8, c. 3915, 34 Stat., p. 770, the

term misbranded "shall apply to all drugs, or articles of food, . . . the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced. . . . An article shall also be deemed to be misbranded: In case of drugs: First. If it be an imitation of or offered for sale under the name of another article. Second. [In case of a substitution of contents,] or if the package fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any such substances contained therein."

It is a postulate, as the case comes before us, that in a certain sense the statement on the label was false, or, at least, misleading. What we have to decide is whether such misleading statements are aimed at and hit by the words of the act. It seems to us that the words used convey to an ear trained to the usages of English speech a different aim; and although the meaning of a sentence is to be felt rather than to be proved, generally and here the impresson may be strengthened by argument, as we shall try to show.

We lay on one side as quite unfounded the argument that the words 'statement which shall be misleading in any particular' as used in the statute do not apply to drugs at all—that the statements referred to are those 'regarding such article,' and that 'article' means article of food, mentioned by the side of drugs at the beginning of the section. It is enough to say that the beginning of the sentence makes such a reading impossible, and that article expressly includes drugs a few lines further on in what we have quoted, not to speak of the reason of the

thing. But we are of opinion that the phrase is aimed not at all possible false statements, but only at such as determine the identity of the article, possibly including its strength, quality and purity, dealt with in § 7. In support of our interpretation the first thing to be noticed is the second branch of the sentence: 'Or the ingredients or substances contained therein.' One may say with some confidence that in idiomatic English this half, at least, is confined to identity, and means a false statement as to what the ingredients are. Logically it might mean more, but idiomatically it does not. But if the false statement referred to is a misstatement of identity as applied to a part of its objects, idiom and logic unite in giving it the same limit when applied to the other branch, the article, whether simple or one that the ingredients compose. Again, it is to be noticed that the cases of misbranding, specifically mentioned and following the general words that we have construed, are all cases analogous to the statement of identity and not at all to inflated or false commendation of wares. The first is a false statement as to the country where the article is manufactured or produced; a matter quite unnecessary to specify if the preceding words had a universal scope, yet added as not being within them. The next case is that of imitation and taking the name of another article, of which the same may be said, and so of the next, a substitution of contents. The last is breach of an affirmative requirement to disclose the proportion of alcohol and certain other noxious ingredients in the package—again a matter of plain past history concerning the nature and amount of the poisons employed, not an estimate or prophecy concerning their effect. In further confirmation, it should be noticed that although the indictment alleges a wilful fraud, the shipment is punished by the statute if the article is misbranded, and that the article may be misbranded without any conscious fraud at all. It was natural enough to throw this risk on

shippers with regard to the identity of their wares, but a very different and unlikely step to make them answerable for mistaken praise. It should be noticed still further that by § 4 the determination whether an article is misbranded is left to the Bureau of Chemistry of the Department of Agriculture, which is most natural if the question concerns ingredients and kind, but hardly so as to medical effects.

To avoid misunderstanding we should add that, for the purposes of this case, at least, we assume that a label might be of such a nature as to import a statement concerning identity, within the statute, although in form only a commendation of the supposed drug. It may be that a label in such form would exclude certain substances so plainly to all common understanding as to amount to an implied statement of what the contents of the package were not; and it may be that such a negation might fall within the prohibitions of the act. It may be, we express no opinion upon that matter, that if the present indictment had alleged that the contents of the bottles were water, the label so distinctly implied that they were other than water, as to be a false statement of fact concerning their nature and kind. But such a statement as to contents, undescribed and unknown, is shown to be false only in its commendatory and prophetic aspect, and as such is not within the act.

In view of what we have said by way of simple interpretation we think it unnecessary to go into considerations of wider scope. We shall say nothing as to the limits of constitutional power, and but a word as to what Congress was likely to attempt. It was much more likely to regulate commerce in food and drugs with reference to plain matter of fact, so that food and drugs should be what they professed to be, when the kind was stated, than to distort the uses of its constitutional power to establishing criteria in regions where opinions are far apart. See *School of*

Magnetic Healing v. *McAnnulty*, 187 U. S. 94. As we have said above, the reference of the question of misbranding to the Bureau of Chemistry for determination confirms what would have been our expectation and what is our understanding of the words immediately in point.

Judgment affirmed.

MR. JUSTICE HUGHES, with whom MR. JUSTICE HARLAN and MR. JUSTICE DAY concurred, dissenting:

I am unable to concur in the judgment in this case, for the following reasons:

The defendant was charged with delivering for shipment in interstate commerce certain packages and bottles of drugs alleged to have been misbranded in violation of the Food and Drugs Act of June 30, 1906, chapter 3915, 34 Stat. 768.

The articles were labeled respectively "Cancerine tablets," "Antiseptic tablets," "Blood purifier," "Special No. 4," "Cancerine No. 17," and "Cancerine No. 1,"—the whole constituting what was termed in substance "Dr. Johnson's Mild Combination Treatment for Cancer." There were several counts in the indictment with respect to the different articles. The labels contained the words "Guaranteed under the Pure Food and Drugs Act, June 30, 1906;" and some of the further statements were as follows:

"Blood Purifier. This is an effective tonic and alterative. It enters the circulation at once, utterly destroying and removing impurities from the blood and entire system. Acts on the bowels, kidneys, and skin, eliminating poisons from the system, and when taken in connection with the Mild Combination Treatment gives splendid results in the treatment of cancer and other malignant diseases. I always advise that the Blood Purifier be continued some little time after the cancer has been killed and removed and the sore healed.

"Special No. 4. . . . It has a strong stimulative and absorptive power; will remove swelling, arrest development, restore circulation, and remove pain. Is indicated in all cases of malignancy where there is a tendency of the disease to spread, and where there is considerable hardness surrounding the sore. Applied thoroughly to a lump or to an enlarged gland will cause it to soften, become smaller, and be absorbed.

"Cancerine No. 1. . . . Tendency is to convert the sore from an unhealthy to a healthy condition and promote healing. Also that it destroys and removes dead and unhealthy tissue."

In each case the indictment alleged that the article was "wholly worthless," as the defendant well knew.

In quashing the indictment the District Court construed the statute. The substance of the decision is found in the following words of the opinion: "Having regard to the intendment of the whole act, which is to protect the public health against adulterated, poisonous, and deleterious food, drugs, etc., the labeling or branding of the bottle or container, as to the quantity or composition of 'the ingredients or substances contained therein which shall be false or misleading,' by no possible construction can be extended to an inquiry as to whether or not the prescription be efficacious or worthless to effect the remedy claimed for it." And the question on this writ of error is whether or not this construction is correct. *United States* v. *Keitel*, 211 U. S. 370.

What then is the true meaning of the statute?

Section 8 provides:

"SEC. 8. That the term 'misbranded,' as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any

particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced."

The words "such article" in this section, as is shown by the immediate context, refer to "drugs" as well as to "food."

"Drugs" are thus defined in § 6:

"SEC. 6. That the term 'drug,' as used in this Act, shall include all medicines and preparations recognized in the United States Pharmacopœia or National Formulary for internal or external use, *and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either man or other animals.*"

Articles, then, intended to be used for curative purposes, such as those described in the indictment, are within the statute, though they are not recognized in the United States Pharmacopœia or the National Formulary. And the offense of misbranding is committed if the package or label of such an article bears any statement regarding it "which shall be false or misleading in any particular."

But it is said that these words refer only to false statements which fix the identity of the article. According to the construction placed upon the statute by the court below in quashing the indictment, if one puts upon the market, in interstate commerce, tablets of inert matter or a liquid wholly worthless for any curative purpose as he well knows, with the label "Cancer Cure" or "Remedy for Epilepsy," he is not guilty of an offense, for in the sense attributed by that construction to the words of the statute he has not made a statement regarding the article which is false or misleading in any particular.

I fail to find a sufficient warrant for this limitation, and on the contrary, it seems to me to be opposed to the intent of Congress and to deprive the act of a very salutary effect.

It is strongly stated that the clause in § 8,—"or the ingredients or substances contained therein,"—has reference to identity and that this controls the interpretation of the entire provision. This, in my judgment, is to ascribe an altogether undue weight to the wording of the clause and to overlook the context. The clause, it will be observed, is disjunctive. If Congress had intended to restrict the offense to misstatements as to identity, it could easily have said so. But it did not say so. To a draftsman with such a purpose the language used would not naturally occur. Indeed, as will presently be shown, Congress refused, with the question up, so to limit the statute.

Let us look at the context. In the very next sentence, the section provides (referring to drugs) that an article shall "*also*" be deemed to be misbranded if it be "an imitation of or offered for sale under the name of another article," or in case of substitution of contents or of failure to disclose the quantity or proportion of certain specified ingredients, if present, such as alcohol, morphine, opium, cocaine, etc.

It is a matter of common knowledge that the "substances" or "mixtures of substances" which are embraced in the act, although not recognized by the United States Pharmacopœia or National Formulary, are sold under trade names without any disclosure of constituents, save to the extent necessary to meet the specific requirements of the statute. Are the provisions of the section to which we have referred, introduced by the word "*also*," and the one relating to the place of manufacture, the only provisions as to descriptive statements which are intended to apply to these medicinal preparations? Was it supposed that with respect to this large class of compositions, nothing being said as to ingredients except as specifically required, there could be, within the meaning of the act, no false or misleading statement in

any particular? If false and misleading statements regarding such articles were put upon their labels, was it not the intent of Congress to reach them? And was it not for this very purpose that the general language of § 8 was used?

The legislative history of the section would seem to negative the contention that Congress intended to limit the provision to statements as to identity. The provision in question as to misbranding, as it stood in the original bill in the Senate (then § 9) was as follows:

"If the package containing it, or its label, shall bear any statement regarding the ingredients or the substances contained therein, which statement shall be false or misleading in any particular."

The question arose upon this language whether or not it should be taken as limited strictly to statements with respect to identity. It was insisted that the words had a broader range and the effort was made to procure an amendment which should be so specific as to afford no basis for the conclusion that any thing but false statements as to identity or constituents was intended. An amendment was then adopted in the Senate making the provision read:

"any statement as to the *constituent* ingredients, or the substances contained therein, which statement shall be false or misleading in any particular."

With this amendment the bill was passed by the Senate and went to the House. There the provision was changed by striking out the word "constituent" and inserting the word "regarding," so that it should read:

"any statement regarding the ingredients or substances contained in such article, which statement shall be false or misleading in any particular."

Finally, it appears, that in conference the bill was amended by inserting the words "*design, or device,*" and also the words "*such article, or;*" and thus the section be-

came a part of the law in its present form—containing the words:

"any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular."

It is difficult to suppose that, with the question distinctly raised, Congress would have rejected the provision of the Senate bill and broadened the language in the manner stated if it had been intended to confine the prohibition to false statements as to identity. Reading the act with the sole purpose of giving effect to the intent of Congress, I cannot escape the conclusion that it was designed to cover false and misleading statements of fact on the packages or labels of articles intended for curative purposes, although the statements relate to curative properties.

It is, of course, true, that when Congress used the words "false or misleading statement" it referred to a well defined category in the law and must be taken to have intended statements of *fact* and not mere expressions of opinion.

The argument is that the curative properties of articles purveyed as medicinal preparations are matters of opinion, and the contrariety of views among medical practitioners, and the conflict between the schools of medicine, are impressively described. But, granting the wide domain of opinion, and allowing the broadest range to the conflict of medical views, there still remains a field in which statements as to curative properties are downright falsehoods and in no sense expressions of judgment. This field I believe this statute covers.

The construction which the District Court has placed upon this statute is that it cannot be extended to any case where the substance labeled as a cure, with a description of curative properties, is "wholly worthless" and is known by the defendant to be such. That is the charge of the indictment.

The question then is whether, if an article is shipped in interstate commerce, bearing on its label a representation that it is a cure for a given disease, when on a showing of the facts there would be a unanimous agreement that it was absolutely worthless and an out and out cheat, the act of Congress can be said to apply to it. To my mind the answer appears clear. One or two hypothetical illustrations have been given above. Others may readily be suggested. The records of actual prosecutions, to which I am about to refer, shows the operation the statute has had and I know of no reason why this should be denied to it in the future.

Our attention has been called to the construction which was immediately placed upon the enactment by the officers charged with its enforcement in the Department of Justice and the Department of Agriculture. It is true that the statute is a recent one, and, of course, the question is one for judicial decision. But it is not amiss to note that the natural meaning of the words used in the statute, reflected in the refusal of Congress to adopt a narrower provision, was the meaning promptly attributed to it in the proceedings that were taken to enforce the law. And this appears to have been acquiesced in by the defendants in many prosecutions in which the defendants pleaded guilty. We have been referred to the records of the Department of Agriculture showing nearly thirty cases in which either goods had been seized and no defense made, or pleas of guilty had been entered. Among these are found such cases as the following:

"No. 29. Hancock's Liquid Sulphur, falsely represented, among other things, to be 'Nature's Greatest Germicide. . . . The Great Cure for . . . Diptheria.' Investigation begun November 22, 1907. Plea of guilty."

"No. 180. Gowan's Pneumonia Cure, falsely represented, among other things, that it 'Supplies an easily

absorbed food for the lungs that quickly effects a permanent cure.' Investigation begun November 22, 1907. Criminal information. Plea of guilty."

"No. 181. 'Eyelin,' falsely represented, among other things, that it 'Repairs and Rejuvenates the Eye and Sight.' Investigation begun February 13, 1908. Plea of guilty."

"No. 261. 'Sure Thing Tonic,' falsely represented, among other things, to be 'Sure Thing Tonic. . . . Restores Nerve Energy. Renews Vital Force.' Investigation begun June 3, 1909. Pleaded guilty."

"No. 424. 'Tuckahoe Lithia Water,' falsely represented, among other things, to be 'a sure solvent for calculi, either of the kidneys or liver, especially indicated in all diseases due to uric diathesis, such as gout, rheumatism, gravel stone, incipient diabetes, Bright's Disease, inflamed bladder, eczema, stomach, nervous, and malarial disorders.' Investigation begun July 9, 1908. Plea of guilty."

"No. 427. 'Cancerine,' falsely represented, among other things, to be 'A remarkably curative extract which if faithfully adhered to will entirely eradicate cancerous poison from the system. . . . A specific cure for cancer in all its forms.' Investigation begun about April 12, 1909. Criminal information. Plea of guilty."

I find nothing in the language of the statute which requires the conclusion that these persons who have confessed their guilt in making false and misleading statements on their labels should be privileged to conduct their interstate traffic in their so-called medicines, admittedly worthless, because Congress did not intend to reach them.

Nor does it seem to me that any serious question arises in this case as to the power of Congress. I take it to be conceded that misbranding may cover statements as to strength, quality and purity. But so long as the statement is not as to matter of opinion, but consists of a false

representation of fact—in labeling the article as a cure when it is nothing of the sort from any point of view, but wholly worthless—there would appear to be no basis for a constitutional distinction. It is none the less descriptive—and falsely descriptive—of the article. Why should not worthless stuff, purveyed under false labels as cures, be made contraband of interstate commerce,—as well as lottery tickets? *Champion* v. *Ames*, 188 U. S. 331.

I entirely agree that in any case brought under the act for misbranding,—by a false or misleading statement as to curative properties of an article,—it would be the duty of the court to direct an acquittal when it appeared that the statement concerned a matter of opinion. Conviction would stand only where it had been shown that, apart from any question of opinion, the so-called remedy was absolutely worthless and hence the label demonstrably false; but in such case it seems to me to be fully authorized by the statute.

Accordingly, I reach the conclusion that the court below erred in the construction that it gave the statute, and hence in quashing the indictment, and that the judgment should be reversed.

I am authorized to say that MR. JUSTICE HARLAN and MR. JUSTICE DAY concur in this dissent.